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In the Supreme Court of the United States

October Term, 1982

FIREFIGHTERS LOCAL UNION NO. 1784,
Petitioner,

vs.

CARL W. STOTTS, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether a district court has the authority to modify a consent decree, silent in regard to layoffs, in such a manner that a bona fide seniority system calling for layoff by seniority is abrogated, in an action where there has been no adjudication of discrimination by the employer or the union.

LIST OF PARTIES

Petitioner Firefighters Local Union No. 1784 intervened in the district court and appeared as an appellant in Court of Appeals Nos. 81-5348 and 81-5349. Memphis Fire Department, Robert W. Walker, City of Memphis and Joseph Sabatini were also appellants below and have filed a separate petition contemporaneously herewith. Carl W. Stotts, individually and as a class representative on behalf of all others similarly situated and Fred L. Jones appeared as appellees in Court of Appeals Nos. 81-5348 and 81-5349, respectively.

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CARL W. STOTTS, et al.,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Firefighters Local Union No. 1784, intervenor-defendant in the district court, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in *Stotts v. Memphis Fire Department* (6th Cir. Nos. 81-5348 and 81-5349, May 7, 1982).

OPINIONS BELOW

The judgment and opinion of the court of appeals of which review is sought is reported officially at 679 F.2d 541. It is unofficially reported at 28 Fair Employment Practice Cases 1491. The opinion is set forth in the appendix to this petition at App. 1. The oral ruling of the district court, not reported, is reproduced in the appendix hereto at App. 72. The judgment and order of the district court, not reported, is reproduced in the appendix to this petition at App. 77.

JURISDICTION

The order of the Court of Appeals for the Sixth Circuit was entered on May 7, 1982. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

The statutory provision involved, §703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(h), is set forth in the appendix beginning at App. 82.

STATEMENT OF THE CASE

These cases originally arose out of a controversy concerning the employment practices of the City of Memphis Fire Department. On February 16, 1977, Carl W. Stotts, a male black employee of the Department filed a class action lawsuit pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e, *et seq.*, and pursuant to 42 U.S.C. §§1981 and 1983. The complaint alleged that the Department maintained racially discriminatory hiring and promotional practices.[1]

At the time the *Stotts* case was filed, a prior consent decree had been approved and entered by the district court in 1974 in the context of a civil rights action brought against the City by the United States.[2] The 1974 Decree, *inter alia*: (1) set forth general long-term goals for the

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1. This action was later consolidated on September 18, 1979 with a similar case brought by Fred L. Jones alleging racially discriminatory promotional policies on the part of the Department.

2. The 1974 Decree is reproduced in part in the appendix to the opinion of the court of appeals (App. at 52-58). The 1980 Decree is reproduced in full in the opinion of the court of appeals (App. at 59-69).

hiring of minority employees in all City divisions (App. at 55, ¶3); (2) made no adjudication of discrimination against the City (App. at 53); (3) contained a denial by the City that it had previously engaged in any pattern or practice of discrimination in hiring or promotion on the basis of race or sex (App. at 53); (4) provided that total or City-wide seniority of the employees should be considered for purposes of promotion, transfer and assignment (App. at 56, ¶6); and (5) stated that implementation of its goals was "subject to the anticipated budgeted vacancies in the City."[3] The 1974 Decree did not address layoffs, reduction in rank and recall rights and contains no award of retroactive or "constructive" seniority.

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3. The 1974 Decree provides as follows at paragraph 10 thereof:

> 10. Subject to the availability of qualified applicants, the City will establish and attempt to achieve from the date of this decree through June 30, 1976, the following goals: An interim goal of increasing the level of black employment in uniform positions in the Fire Division by five (5) per cent of the total uniformed personnel; an interim goal of increasing the level of black employment in the Police Division by seven (7) per cent of the total uniformed personnel, and an interim goal of increasing the level of female employment in uniformed positions in the Police Division (other than parking meter patrol) by between four (4) and five (5) per cent of total uniformed personnel, it being understood that a female black employee counts in both percentages. All of said goals are subject to the anticipated budgeted vacancies in the City. The Fire and Police Divisions shall be reviewed at the close of the initial period as specified above and goals for succeeding periods will be established which will be based on filling anticipated vacancies in these divisions with black and female personnel in approximately the same manner as in the initial period. No specific numerical ratio for employment of black or female patrol officers or black fire fighters shall be established unless the City fails in its good faith attempt to meet the interim goals established pursuant to this paragraph. The question of goals for female fire fighters will be reviewed by the parties at the end of the initial period.

This paragraph and paragraphs 11 through 23 of the 1974 Decree were not reproduced in the appendix to the opinion of the court of appeals. This omission is curious especially as paragraph 10 bears upon the matter of "economic hardship" addressed by the court of appeals (App. at 32).

The original parties to *Stotts* agreed to a consent decree that was approved by the district court on May 16, 1980. The 1974 Decree provided the framework upon which the 1980 Decree was constructed. The 1980 Decree *inter alia*: (1) adopted the general long-term minority hiring goal provided in the 1974 Decree and additionally provided for interim minority hiring goals (App. at 64, ¶6); (2) made no adjudication of discrimination against the City; (3) contained no admission of any violation of law by the City (App. at 60); (4) stated that it was not intended to conflict with any provisions of the 1974 Decree, but was intended to "parallel and supplement" the relief therein provided (App. at 60) and (5) contained a waiver of the right to seek further relief except to enforce the provisions of the decree (App. at 61). The 1980 Decree, like the 1974 Decree, was silent with respect to layoffs or reduction in rank. The district court retained jurisdiction to effectuate the purposes of the 1980 Decree (App. at 69, ¶17).

The immediate controversy crystallized in May, 1981 following the City's announcement of a proposed operating budget that provided for a reduction in personnel in all divisions. The City also announced a Layoff Policy which was based upon a seniority system founded upon length of service with the City. The city-wide seniority system invoked by the Layoff Policy was adopted by the City as a formal employment practice in 1973, is referred to in the 1974 Decree, and was incorporated into the City's labor memoranda with Firefighters Local Union No. 1784 in 1975 (App. at 80) and has remained a part of succeeding memoranda.

On May 4, 1981, Stotts applied for and obtained a temporary restraining order from the district court restraining the City from laying off or reducing in rank any black employee of the Department. The Union intervened in this litigation for the first time by consent of

the parties on May 5, 1981, to protect the seniority system. An evidentiary hearing on Stotts' request for a preliminary injunction was held by the district court on May 8, 1981.

At the close of the hearing, the district court found that neither the 1974 Decree nor the 1980 Decree contemplated a method to be used for layoffs or reduction in rank (App. at 73). However, the court held that it did possess the authority to modify the 1980 Decree by enjoining the City from applying the proposed Layoff Policy based on city-wide seniority insofar as it would decrease the percentage of minority employees in certain ranks within the Department (App. at 75). With respect to the Layoff Policy and seniority system, the district court made this finding:

> I do find that the adoption of this layoff policy was not adopted with the intent or specific purpose to discriminate against black, and I find no reason - well, neither the layoff nor the policy adopted was intended to be discriminatory. However, I find it inescapable that the effect is discriminatory. (App. at 73)
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> However, because the effect of that, and the proposed system is in effect discriminatory, I find that such a position is not a bona fide seniority system. (App. at 74)

Judgment on the district court's ruling was entered on May 18, 1981 (App. at 77). The Union and the City timely noticed their appeals on the same day. On May 7, 1982, the court of appeals affirmed the district court. Although finding that the district court had erred in ruling that the seniority system was non-bona fide, the court of appeals held that the district court did not abuse its discretion in modifying the 1980 Decree.

REASONS FOR GRANTING THE WRIT

1. An Important Issue Is Presented Concerning the Extent of a District Court's Authority to Modify a Consent Decree in a Title VII Case.

The decision of the court of appeals decides an important question of federal law which has not been but should be decided by this Honorable Court. Despite the "special treatment" afforded to seniority systems by §703 (h) of Title VII of the Civil Rights Act of 1964, the courts below have abrogated a bona fide seniority system protected by §703(h). In reality, the courts below have violated one section of Title VII to remedy alleged violations of Title VII.

Crucial to the *Stotts* opinion, like the recent opinion of the First Circuit in *Boston Chapter NAACP v. Beecher*, ... F.2d ....., 28 FEP Cases 1657 (1st Cir. 1982), is the conclusion that a district court has the authority, pursuant to its equitable jurisdiction, to modify consent decrees in Title VII cases in order to meet previously unanticipated circumstances. The court of appeals draws its rationale in large part from decisional authority of this Court developed in the context of antitrust litigation. *See United States v. United Shoe Corp.*, 391 U.S. 244 (1968); *United States v. Swift & Co.*, 286 U.S. 106 (1932). This authority is distinguishable because those cases did not involve situations where a district court's authority to modify was limited by a congressionally mandated exemption to the law's application. The instant cases do.

Specifically, §703(h) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(h) immunizes bona fide seniority systems from challenge under Title VII, even where such systems operate to perpetuate the effects of discrimination. *International Brotherhood of Teamsters v. United States*,

431 U.S. 324 (1977); *United Airlines, Inc. v. Evans,* 431 U.S. 553 (1977). Pursuant to §703(h), a showing of disparate impact is insufficient to invalidate a seniority system. A discriminatory purpose must be proven, requiring a trial on the issue of discriminatory intent. *Pullman-Standard v. Swint,* ..... U.S. ....., 102 S.Ct. 1781, 1784 (1982).

The district court's finding that the seniority system was non-bona fide was vacated by the court of appeals as being in conflict with prior authority of this Court (App. at 11 n.6; 41). No discriminatory purpose was proven. There has been no adjudication of discrimination against the City, the Department or the Union in this litigation or its antecedent. *Compare, Boston Chapter NAACP v. Beecher,* ..... F.2d ....., 28 FEP Cases 1657 (1st Cir. 1982). Yet, the courts below chose to ignore the protection that §703(h) afforded to the seniority system in question. In fact, those courts violated §703(h) by ignoring it and granting plaintiffs relief which abrogated the system.

Neither the broad remedial nature of Title VII nor the broad discretion conferred to the district court in administering consent decrees can justify the orders below. This Court has concluded that §703(h) imposes significant restraints upon the authority of district courts to set aside seniority systems in effectuating affirmative relief. *See American Tobacco Co. v. Patterson,* ..... U.S. ....., 102 S.Ct. 1534, 1541 (1982). The court of appeals has failed to provide convincing reasons why the dictates of §703(h) should be ignored when providing similar affirmative relief by modifying a consent decree, particularly where there has been no adjudication of discrimination. Though the court of appeals mimics the previous rulings of this Court, it fails to apply their substance.

The court of appeals insists that the district court acted within the limits of its broad equitable discretion in administering consent decrees, as a result of the changed circumstances occasioned by the proposed layoffs (App. at 31-32, 35-37).[4] Yet the court offers no cogent explanation why the authority of the district court to modify the consent decree is not limited by §703(h).

The decisional authority of this Court has emphasized that seniority systems are afforded "special treatment" under Title VII itself. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1977). The court of appeals makes no mention of the importance which Congress and this Court have accorded to seniority systems and collective bargaining. *See Patterson*, 102 S.Ct. at 1541 n.17 (1982). As this Court has stated, in a proper circumstance, an appropriate remedy for adoption of a discriminatory seniority system might likely include an injunction against the application of the system. "Such an injunction, however, would lie only if the requirement of §703(h) - that such application be intentionally discriminatory - were satisfied." *Id.* at 1538.

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4. The court of appeals finds applicable two of the three grounds on which consent decrees generally may be modified (App. at 31-37). In addition to finding that the district court acted within its "equitable discretion," the court also proffers a contractual interpretation rationale. The Court unabashedly ignores relevant provisions of the two consent decrees in finding that the district court's modification was in accordance with "basic contract principles" (App. at 31, 32-34). The decrees did no more than mandate performance expectations in the areas of hiring and promotions, if hiring and promotions were made. They required neither hiring nor promotions to be made. The proposed Layoff Policy did not repudiate the City's responsibilities in either area. Also, the decrees acknowledge that the implementation of their terms is subject to budgetary restrictions (*See* note 3, *supra*); that seniority is a legitimate consideration in employment decisions by the City (App. at 56, ¶6); and that any further relief is waived except to the extent necessary to enforce the provisions of the decrees (App. at 61). The court of appeals fails to engage in an even-handed consideration of those terms of the decrees in its contractual interpretation. In fact, the court of appeals' decision is in all respects a result-oriented decision.

The injunction of the district court modifying the 1980 Decree was not applied in a proper context. As the court of appeals acknowledged, "the layoff policy was not adopted with a discriminatory purpose." (App. at 11 n.6). Neither has there been an adjudication that the seniority system is not neutral; that it is irrational in light of general practice; that the system had its genesis in racial discrimination; or that the system was negotiated and maintained without freedom from any illegal purposes. *See Swint*, 102 S.Ct. at 1784, 1785; *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310 (5th Cir. 1977).

Not only is there no proof in the record indicating that the seniority system herein is non-bona fide, neither is there any previous adjudication of intentional discrimination in the record with regards to the City, the Department or the Union which might lead to an inference of intentional discrimination. What is apparent is that the courts below - purportedly acting pursuant to their equitable jurisdiction to effectuate the purposes of Title VII - have exceeded their authority under Title VII by violating Title VII in the name of remedying alleged violations of that statute. This practice ignores relevant provisions of the very statute which the court of appeals purports to uphold. The decision of the court of appeals must not be permitted to stand.

2. The Rationale of the Court of Appeals Undermines the Incentives for Settlement of Employment Discrimination Litigation.

The decision of the court of appeals places in considerable jeopardy the prospect for settlement of future Title VII cases. It does so by removing the incentives for settlement. Should the *Stotts* opinion stand, employers and unions in the future will view it as a signal that consent

decrees in Title VII cases render unto district courts unlimited authority to confer relief to plaintiffs beyond the negotiated parameters of the decrees upon the outset of unanticipated circumstances. In effect, no one will be certain that the settlement agreed to will be the settlement implemented in the long run. As a result, it can be reasonably anticipated that employers shall become reluctant to settle and unions shall step forward to object to the entry of consent decrees even when their interests are not obviously implicated.

The approach of the court of appeals is that the parties to an employment discrimination suit, and even non-parties, relinquish the right to litigate all possible issues, even issues unforeseen, once a consent decree is entered (App. at 24). While plaintiffs forego the possibility of receiving such relief as back pay and promotions which they might obtain if they prove their allegations, defendants are said by the court of appeals to relinquish "the right to rebut the allegations of discrimination" contained in the plaintiffs' complaint and to "avoid the affirmative responsibilities imposed by a judicial finding of discrimination." (App. at 24). The district court is conferred the authority to police the implementation of the decree, including the power to require specific performance of its terms, even if economic hardship ensues (App. at 24, 32-33). The court of appeals holds that the district court's policing authority encompasses the power to modify the decree upon changed circumstances to effectuate the purposes of the decree. However, what the court of appeals has allowed the district court to do herein is to completely disregard the law and the congressional mandate behind the law as to seniority systems, regarding an issue not addressed in the pleadings and orders in the case, in the name of policing the consent decree. Rather than eliminating the uncertainties of litigation, this approach imposes upon parties and

even upon nonparties the threat of continuing uncertainties. This result is clearly illustrated by the instant case.

Importantly, the 1974 Decree makes no adjudication of discrimination (App. at 53). The 1974 Decree contains evidence that the City did not relinquish its right to rebut the allegations of discrimination made against it. The City expressly denied in the 1974 Decree itself that it had previously engaged in any pattern or practice of discrimination in hiring or promotion on the basis of race or sex (App. at 53). The 1974 Decree conditioned implementation upon the existence of "anticipated budgeted vacancies" (*see* note 3). The language of the 1974 Decree did not give the Union cause for concern that the city-wide seniority system then in effect would be compromised; to the contrary, the 1974 Decree endorses the system (App. at 56, ¶6).

The 1980 Decree also makes no adjudication of discrimination, nor does it contain an admission of discrimination (App. at 60). As the 1980 Decree supplements and parallels the 1974 Decree (App. at 60), the City's denial of intentional discrimination in the 1974 Decree is equally applicable thereto as is the provision concerning conditional implementation (*see* App. at 53; note 3). In stark contrast to the approach of the court of appeals, the 1980 Decree contains a waiver of the plaintiffs' right to seek further relief except to enforce the "four corners" of the decree (App. at 61). Again, the Union was not placed on notice by the 1980 Decree that its collectively-bargained seniority system could be abrogated upon the advent of changed circumstances.

The approach of the court of appeals is fundamentally at odds with the understanding of the parties as reflected in the decrees at issue herein. Rather than encouraging compromise and settlement, the approach of the court of

appeals fosters uncertainties that reduce the incentive of employers to settle employment discrimination litigation and increase the likelihood of challenges from concerned third parties, particularly labor unions, that would necessitate a trial on the merits. *See, e.g., United States v. Miami*, 664 F.2d 435 (5th Cir. 1981).

CONCLUSION

The issue presented by this petition is certain to recur. The court of appeals has simply ignored the congressional mandate of §703(h) and the authorities of this Court interpreting that statutory provision. The Court should grant a writ of certiorari to ensure consistency of statutory interpretation and implementation and to avoid irreparable damage to the incentives for defendants to settle employment discrimination cases.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

Nos. 81-5348-9

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CARL W. STOTTS, Individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

and

FRED L. JONES,

Plaintiff-Appellee,

v.

MEMPHIS FIRE DEPARTMENT; ROBERT W. WALKER, CITY OF MEMPHIS, and JOSEPH SABATINI,

Defendants-Appellants,

and

FIREFIGHTERS LOCAL UNION 1784,

Defendant-Intervenor-Appellant.

ON APPEAL from the United States District Court for the Western District of Tennessee.

Decided and Filed May 7, 1982.

Before: KEITH and MARTIN, Circuit Judges and DUNCAN.*

KEITH, Circuit Judge, delivered the opinion of the court, in which DUNCAN, Circuit Judge, joined. MARTIN, Circuit Judge (pp. 46-51), delivered a separate opinion, concurring and dissenting in part.

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* Hon. Robert M. Duncan, U.S. District Court for the Southern District of Ohio, sitting by designation.

KEITH, Circuit Judge. This case presents questions regarding the entry and modification of a consent decree in an employment discrimination case. In 1977, Plaintiff-appellee Carl Stotts filed a class action against the City of Memphis, alleging that the Fire Department's hiring and promotion policies were racially discriminatory. After three years of discovery and intensive negotiations, the Stotts suit was settled by a consent decree in 1980 ("1980 Decree"). No trial was held. The 1980 Decree was intended to supplement an earlier consent decree entered in 1974 which affected employment practices in all divisions of the Memphis city government. The 1980 Decree provides for back-pay awards and an affirmative action plan containing specific hiring and promotion goals. The decree does not specifically address the effect layoffs would have on these affirmative action goals.

In 1981, the City of Memphis announced that city-wide layoffs were necessary to alleviate an unanticipated economic crisis. The proposed layoffs in the Fire Department threatened to frustrate the purpose of the decrees and the progress accomplished under them. Minority employment in the Fire Department would have been devastated by the proposed layoffs. Plaintiff Stotts filed a motion to restrain the City of Memphis from implementing the layoff proposal in a manner which affected minority firemen. The district court found that the proposed layoffs were an unanticipated change in circumstance not contemplated by the consent decrees. Accordingly, the court modified the decrees and enjoined the proposed layoffs and demotions of minority firemen. We affirm.

I. FACTS

In 1974, the United States Department of Justice ("Government") instituted an action against the City of Memphis ("City") under Title VII, 42 U.S.C. § 2000e *et seq.*, 42 U.S.C. § 1981,[1] the Fourteenth Amendment, and the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. § 1221 *et seq.* The complaint alleged that the Fire Department and various other City divisions had engaged in a pattern or practice of race and sex discrimination in hiring and promotions. The City initially denied the allegations. Later in 1974, however, it agreed to settle the litigation with a consent decree ("1974 Decree").[2]

The motivation for the 1974 Decree was the desire to remedy past discrimination and avoid the delay and expense of further litigation. In the decree, the City did not admit to any misconduct. The City did acknowledge, however, that its employment practices may create an inference of racial and sexual discrimination.

The purpose of the 1974 Decree is to remedy any disadvantage to blacks and women which may have resulted from past discrimination. Subject only to the availability of qualified applicants, the City agreed to undertake the "goal of achieving throughout the work force proportions of minority and female employees in each job classification approximating their respective proportions in the civilian labor force." The decree established interim hiring goals for each of the City's divisions. The interim goal affecting the Fire Department required that minority employment in the uniformed positions

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[1] § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

[2] See appendix page 1.

increase by 5% before July of 1976. The decree also required the City to "engage in affirmative recruitment activities consistent with their obligation to take all reasonable steps to reach the goals set forth" in the decree. Specific numerical hiring ratios would be established if the City failed in its good faith attempt to meet the interim hiring goal.

The 1974 Decree did not establish specific minority employment goals for the ranks above firefighter. However, the decree acknowledged the need to increase substantially the number of minorities in supervisory positions. In fact, the decree committed the City to "making significant progress in increasing the number of black and female supervisory personnel." Numerical promotional goals could be imposed if the City's performance during the preceding fiscal year did not satisfy its obligations under the decree.

On February 16, 1977, Carl Stotts, plaintiff-appellee, filed a class action suit against the Memphis Fire Department. His complaint alleged that the Fire Department's hiring and promotion policies violated Title VII, 42 U.S.C. § 2000e *et seq.*, 42 U.S.C. § 1981, and 42 U.S.C. § 1983.[3]

The Pioneers, a group of approximately 70 minority Memphis firemen, filed a motion to intervene in the Stotts case. The trial court denied the Pioneers' motion to intervene, but certified the case as a class action. During the following months, the Stotts case received extensive attention in the local media. The press coverage included several articles describing the Stotts case and its effect on the Fire Department.

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[3] § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

On June 19, 1979, Fred Jones, plaintiff-appellee, filed an action against the City, alleging that the Fire Department had denied him a promotion solely because of his race. The Jones and Stotts cases were consolidated in September. On September 27, District Judge McRae set a trial date for the Stotts case but, nonetheless, encouraged the parties to settle the action.

In December, Plaintiffs-appellees Stotts and Jones ("Plaintiffs") filed a motion for a temporary restraining order ("TRO") to enjoin the City from making promotions within the Fire Prevention Bureau. The Plaintiffs stated they would be irreparably harmed if the scheduled promotions occurred. As proposed, the promotions would fill certain positions and prevent minorities from acquiring the experience necessary to qualify them for supervisory positions. The City opposed the motion, arguing that the promotions were necessary for the efficient operation of the Fire Department. The creation of acting or temporary positions would create instability within the department. The City stated emphatically, "We do need to make the promotions." The trial court granted the TRO after finding that, "there would be irreparable harm if promotions were granted that were not consistent with the rights of the plaintiffs."

On January 17, 1980, the City appeared before Judge McRae and stated that settlement negotiations were continuing. On February 20, 1980, both the City and Plaintiffs appeared before the court and stated that the settlement was complete "except for about five different things." Five days later, the parties again appeared before the court and stated that negotiations concerning the settlement were continuing despite some difficulties concerning the affirmative relief and monitoring sections of the proposed settlement.

Finally, on April 25, 1980, the parties announced that they had reached a settlement. The settlement consisted of an affirmative action plan embodied in the 1980 Decree. The 1980 Decree contained hiring and promotion goals. The

decree was the final resolution of the consolidated Stotts case and applied to all class members. The parties informed the court that they only sought preliminary approval of the decree and the court's consent to post the decree for 15 days in the Memphis Fire Stations for comment. Counsel also stated that he thought the Firefighters Local Union 1784 ("Firefighters Union") might object to the decree.

The purpose of the 1980 Decree was to remedy the past hiring and promotions practices of the Memphis Fire Department relative to minorities. The 1980 Decree was intended to parallel and supplement the relief provided in the 1974 Decree. The decree reaffirmed the City's commitment to achieve the long-term goal of increasing minority representation in each job classification to levels approximating the level of minority representation in the Shelby County labor force. The 1980 Decree also established specific hiring and promotion goals. The hiring goal stated that qualified minorities should fill at least 50% of all vacancies. The promotional goal indicated that qualified minorities should receive 20% of the vacancies. The promotional goal was adopted to "insure as quickly as practicable the attainment of [the] long range goal." Back pay in the amount of $60,000 was also awarded to class members in varying amounts according to their length of service. In addition, the decree required the trial court to retain jurisdiction to make "such further orders as may be necessary or appropriate to effectuate the purposes of this decree."

Neither the Firefighters Union nor any class member filed an objection to the decree during the 15 day period. On May 12, 1980, however, a group of eleven non-minority firemen objected to the entry of the 1980 Decree and filed a motion to intervene. These proposed intervenors filed on behalf of themselves and allegedly all other non-minority firemen. The non-minority firemen were not, however, representatives of the Firefighters Union, the union representative of Memphis firemen.

The non-minorities asserted that the promotional goals contained in the 1980 Decree operated as "reverse discrimination against the non-minorities." The non-minorities also asserted that less burdensome alternative relief for minority employees was available which did not shift discrimination to non-minority employees. These alternatives included the creation of additional positions for promotion, organizational restructuring of the Memphis Fire Department, constructive promotion,[4] and the payment of monetary damages to non-minority employees affected by the decree.

On May 16, 1980, the court held a hearing. The court heard objections to the 1980 Decree and the motion to intervene. No class member filed an objection to the decree. The proposed intervenors indicated that the only immediate relief they sought was a delay in the approval of the promotion section of the decree. Allegedly, additional discovery and expert statistical analysis were necessary before concrete alternative remedies for the past discrimination minorities experienced could be presented. The proposed intervenors' position was that the decree should not have any affect on the promotional opportunities of incumbent employees. The proposed intervenors did not argue that the relief provided in the 1980 Decree unduly burdened a readily identifiable, small group of incumbent employees. Nor did the proposed intervenors argue that the decree was the product of collusion.

The court denied the proposed intervenors' motion to intervene after finding that the proposed intervenors adopted a "wait-and-see" approach to the litigation. The alternatives suggested by the proposed intervenors were also considered and rejected. Continuation of the TRO would unduly hamper the functioning of the Fire Department. The court also

[4] According to the proposed intervenors, constructive promotions would occur whenever a minority and non-minority candidate were equally qualified for a position but the minority got the position. The minority would obtain the title, responsibility, and pay for the promotion while the non-minority would receive the pay as a constructive promotion.

opined that it could take judicial notice that the City's past employment practices were racially discriminatory based on evidence contained in the record. Ultimately, the court determined that the 1980 Decree was "reasonable".

On May 4, 1981, Joseph Sabatini, Director of Personnel for the City, publicly announced a personnel reduction in non-essential services in all divisions of the City government. The proposed layoffs were the first in the City's history. The City's layoff policy was based on an individual's city-wide union seniority, that is, the length of his tenure as a city employee. The seniority system was mentioned in the 1974 Decree and is incorporated in the City's memorandum of understanding with the Union.

A deficit in the City's projected operating budget prompted the proposed layoffs. The deficit was caused by an unanticipated decrease in the general revenue funds from the 1980-81 fiscal year and an increase in operating costs. Plaintiffs were not given an opportunity to review the City's layoff policy before it was announced publicly. The Mayor had ultimate authority to determine which job classifications within the city government were affected by the new layoff policy.

On May 4, 1981, Plaintiffs obtained a TRO restraining the City from laying off or reducing in rank any minority employee in the Memphis Fire Department. The parties consented to the intervention of the Firefighters Union in the Stotts case the next day.

An evidentiary hearing was held on May 8 to consider Plaintiffs' request for a preliminary injunction. The court made several determinations. First, the announced layoffs and demotions were an unanticipated changed circumstance not provided for in the text of the decree. Second, the 1980 Decree was designed to correct the effects of the City's hiring and promotion practices. Finally, the court concluded that the proposed layoffs would have a devastating and retrogressive effect on minority employment and the affirmative action accomplished pursuant to the consent decrees. Most minori-

ties above the rank of private had accrued little seniority in their respective ranks. Consequently, nearly 60% of all firemen affected by the demotions would have been minorities. Moreover, fifty-five percent of all minority Lieutenants and 46% of all minority Drivers would either have been laid off or demoted if the announced layoffs had occurred.

Based on this and other evidence in the record,[5] the court

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[5] Between 1950 and 1976, the Memphis Fire Department hired 94 black and 1683 white firemen. Promotions within the Fire Department between the years of 1969 and 1975 were as follows:

MEMPHIS FIRE DEPARTMENT PROMOTIONS

1969	Black	White
Lieutenant	1	17
1970	**Black**	**White**
Driver	1	60
1971	**Black**	**White**
Driver	1	13
Lieutenant	0	15
Captain	0	1
1972	**Black**	**White**
Drivers	2	128
Lieutenant	1	57
Investigator — Lieutenant	0	6
Captain	0	2
1973	**Black**	**White**
Investigator — Captain	0	5
Captain	0	3
Emergency Unit — Lieutenant	0	4
1974	**Black**	**White**
Driver	1	39
Lieutenant	0	21
1975	**Black**	**White**
Driver	0	8
Lieutenant	0	5
Captain	0	2

In 1979, blacks constituted between 33 and 37 percent of the Memphis population. However, the Fire Department was only 10 percent black. The past hiring and promotional policies of the City of Memphis caused the Fire Department to exhibit the following racial characteristics in 1979:

	BLACK	WHITE
1. ADMINISTRATION		
Senior Account Clerk	0	2
Accountant	0	1

(Continued)

		BLACK	WHITE
	Clerk Typist	0	1
	Senior Clerk Typist	1	6
	Stenographer	1	1
	Secretary	0	4
	Executive Secretary	0	1
	Personnel Lieutenant	0	1
	Master Plans Coordinator	0	1
	OSHA Coordinator	0	1
	Manager — Fire Personnel	0	1
	Administrative Assistant	0	1
	Administrative Chief	0	1
	Deputy Director	0	2
	Director	0	1
	Total	2	25
II.	APPARATUS MAINTENANCE		
	Vehicle Serviceman	2	0
	Preventive Maintenance Repairman	4	3
	Fire Maintenance Mechanic	0	21
	District Chief	0	2
	Total	6	26
III.	MATERIAL SERVICES		
	Storage Keeper	0	1
	Crewman	8	2
	Building Maintenance Supervisor	0	1
	Manager	0	1
	Total	8	5
IV.	AIR MASK SRV		
	Hydrant Repairman	0	4
V.	TRAINING & WATER		
	Lieutenant	0	6
	Captain	0	1
	Total	0	7
VI.	COMMUNICATIONS		
	Fire Alarm Operator I	1	4
	Fire Alarm Operator II	1	8
	Fire Alarm Operator III	1	21
	Senior Fire Alarm Operator	0	7
	Fire Maintenance Electrician	0	5
	Watch Commander	0	3
	Manager	0	1
	District Chief	0	1
	Total	3	50

ruled that the layoff policy would have a discriminatory impact and the seniority system was non-bona fide.[6] Subsequently, the court modified the consent decree to minimize the disrup-

		BLACK	WHITE
VII.	FIRE PREVENTION		
	Home Fire Safety Representative	5	3
	Parts Assistant	0	1
	Master Plans Coordinator	0	1
	Fire Inspector	1	19
	Fire Investigator	2	2
	Manager	0	1
	Fire Prevention Supervisor	0	3
	Fire Safety Ed. Coord.	0	1
	Deputy Fire Marshall	0	3
	Assistant Fire Marshall	0	1
	Fire Marshall	0	1
	Total	8	37
VIII.	FIRE FIGHTING		
	Fire Private I	0 (13)	7 (31)
	Fire Private II	100 (71)	594 (504)
	Driver	8 (15)	281 (296)
	Lieutenant	2 (29)	215 (211)
	Captain	1 (2)	73 (82)
	Air Crash Chief	0	1
	District Chief	0	20
	Deputy Chief	0	4
	Total	111	1195
IX.	AMBULANCE SERVICE		
	Emergency Unit Operator	7	82
	Emergency Unit Lieutenant	0	6
	District Chief	0	1
	Total	7	89

(As of May 8, 1981)

In *Teamsters*, *supra*, the Supreme Court stated statistics indicating racial imbalance are often "a telltale sign of purposeful discrimination." It is ordinarily expected that nondiscriminatory hiring practices will in time result in a workforce more or less representative of the racial composition of the city. *Id.* at 340, n.20. In the spring of 1981, blacks constituted only 11 percent of the Memphis Fire Department. Approximately 35 percent of the City of Memphis is black. The statistics contained in this record represent a very strong prima facie case of employment discrimination.

[6] The district court erred in ruling that the seniority system was non-bona fide. The district court found that the layoff policy was not adopted with a discriminatory purpose. That finding has not been challenged on appeal. *See Taylor* v. *Mueller Co.*, 660 F.2d 1116, 1122 (6th Cir. 1981). The district court did find that the layoffs would have a disparate impact on minority employment.

tive effect the layoffs would have on the efforts to achieve the goals of the decree. The court enjoined the City from applying the layoff policy based on seniority insofar as it would decrease the percentage of black Lieutenants, Drivers, Inspectors, and Privates employed in the Memphis Fire Department. The City and the Union appealed.

On June 22, 1981, Plaintiffs filed a motion requesting the court to enjoin the proposed layoffs and demotions of minority employees in five additional positions. After a hearing on the motion, the court expanded the preliminary injunction to include three of the five positions.

Both the City and the Union filed a motion with the trial court to stay its injunction pending appeal. The trial court denied the stay on May 18, 1981. On June 25, 1981, a panel of this Court also denied the motion for a stay pending appeal.

INTRODUCTION

The principal issue raised on appeal is whether the district court erred in modifying the 1980 Decree to prevent minority employment from being affected disproportionately by unanticipated layoffs. This issue, however, cannot be properly addressed until it is first determined whether the underlying consent decree is fair and reasonable. Only a reasonable consent decree can be validity modified. Thus, we must first discuss the procedure for approving consent decrees.

PRELIMINARY APPROVAL

Before preliminarily approving a consent decree, a court must first determine that the decree is the result of good faith, arms-length negotiations. *United States* v. *Miami*, 614 F.2d 1322, 1330-31 *on reh.*, 664 F.2d 435 (5th Cir. 1981); *Flinn* v. *FMC Corp.*, 528 F.2d 1169, 1173 (2d Cir. 1975), *cert. denied*, 424 U.S. 967 (1976). A preliminarily approved decree is presumptively reasonable. *See Metropolitan Hous-*

ing Development Corp. v. *Village of Arlington Heights*, 616 F.2d 1006, 1013 (7th Cir. 1980); *United States* v. *Philadelphia*, ¶ 31,327 (E.D. Penn. 1980). Notice of the preliminarily approved decree must be given to class members and others who may be affected by the decree. *See Village of Arlington Heights*, 616 F.2d at 1014. A hearing should be held after an appropriate period of time. The hearing should be a forum in which any comments and objections to the decree can be aired. *Village of Arlington Heights*, 616 F.2d at 1014; *Equal Employment Opportunity Commission* v. *American Telephone and Telegraph Co.*, 556 F.2d 167, 173 (3d Cir. 1977), *cert. denied sub nom; Communication Workers of America* v. *EEOC*, 438 U.S. 915 (1978); *Dennison* v. *Los Angeles*, 658 F.2d 694, 695-96 (9th Cir. 1981); *Baker* v. *Detroit*, 504 F.Supp. 841, 847 (E.D. Mich. 1980)

In the instant case, the parties engaged in extensive discovery and were fully prepared for trial before they reached a settlement. The City's behavior during discovery was described by the district court as "obstructionist". The City bitterly contested the TRO which enjoined certain promotions in the Fire Department pending the outcome of the Stotts litigation. Four months before the 1980 Decree was announced, the City informed the court that settlement negotiations were continuing. On February 20, 1980, it appeared that settlement negotiations were nearly complete. Five days later, however, the parties appeared before the court and stated that the affirmative relief and monitoring sections of the decree were a source of disagreement. A final agreement on the terms of the 1980 Decree was not reached until nearly two months later on April 25, 1980. The court preliminarily approved the decree and posted it in the fire halls for two weeks.[7] At the end of the two week period, the court

[7] We express no opinion on the adequacy of the notice afforded by the posting procedure utilized in this case. No objections were made to the posting procedure either in the district court or on appeal. Accordingly, we do not address the notice issue.

held a hearing to consider objections to the decree. Subsequently, the court determined that the decree was a product of arms-length negotiations.[8] The procedure adopted by Judge McRae in preliminarily approving the decree was adequate.

REASONABLENESS HEARING

The determination of whether the decree is adequate, fair, and reasonable should only occur after the court has had an opportunity to hold a hearing to consider objections to the decree. *See, e.g., Village of Arlington Heights,* 616 F.2d at 1014; *Airline Stewards and Stewardesses Assoc.* v. *American Airlines,* 573 F.2d 960, 964 (7th Cir. 1978) (per curiam), *cert. denied sub nom., Assoc. of Professional Flight Attendants* v. *Airline Stewards and Stewardesses Assoc.,* 438 U.S. 876 (1978); *Culbreath* v. *Dukakis,* 630 F.2d 15, 23 (1st Cir. 1980); *Cotton* v. *Hinton,* 559 F.2d 1326, 1330 (5th Cir. 1977); *Miami,* 614 F.2d at 1331-1334. This reasonableness determination is an issue of law to be determined by the court. *See Setser* v. *Novack Invest. Co.,* 657 F.2d 962, 969 (8th Cir. 1981), *cert. denied,* — U.S. —, 102 S.Ct. 615 (1981); *Baker,* 504 F.Supp. at 843 n.1. The court should not determine the merits of the controversy or the precise facts underlying the legal positions of the litigants presenting the consent decree. *See Swift & Co.* v. *United States,* 276 U.S. 311, 324 (1928); *Airline Stewards and Stewardesses Assoc.,* 573 F.2d at 963-64. Instead, the court should merely satisfy itself that the decree is reasonable.

In making the reasonableness determination, the court is under a duty to evaluate three factors. First, the court must consider whether the decree is a fair and adequate resolution

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[8] The better practice is to determine that the decree is not the product of collusion before the decree is preliminarily approved.

of the allegations contained in the complaint.[9] *See FMC Corp.*, 528 F.2d at 1172; *United States* v. *Trucking Employers, Inc.*, 561 F.2d 313, 317 (D.C. Cir. 1977); *later app.*, *United States* v. *Trucking Management, Inc.*, 662 F.2d 36 (D.C. Cir. 1981). *Cotton*, 559 F.2d at 1330. Ordinarily, the following factors will be considered: 1) the complexity, expense and likely duration of the litigation; 2) the stage of the proceedings and the amount of discovery completed; 3) the risks of litigation; 4) the resources of the defendant; and 5) the reasonableness of the settlement in light of the best possible recovery. *See FMC Corp.*, 528 F.2d at 1173; *Ingram* v. *Madison Square Garden Center, Inc.*, 21 EPD ¶ 30,393, 13,254 (S.D. N.Y. 1979); *Women's Committee* v. *National Broadcasting Co.*, 76 F.R.D. 173, 175 (S.D. N.Y. 1977). The court should be sensitive to the objections made by class members. *FMC Corp.*, 528 F.2d at 1173; *Cotton*, 559 F.2d at 1331.

Second, the court must consider whether the decree is fair and reasonable to non-minorities who may be affected by it. *Vulcan Society* v. *White Plains Fire Department*, 505 F. Supp. 955 (S.D. N.Y. 1981). *American Airline Stewards and Stewardesses*, 573 F.2d at 964. An identifiable statistical disparity must exist before a decree may embody affirmative relief provisions.[10] *See United Steelworkers* v. *Weber*, 443 U.S. 193, 208 (1979), *on remand*, *Weber* v. *Kaiser Aluminum & Chemical Corp.*, 611 F.2d 132 (5th Cir. 1980). The affirma-

[9] The effects of discriminatory pre-Act and post-Act employment practices may be remedied by an affirmative action plan emboided in a consent decree. *See Detroit Police Officers Association*, 608 F.2d at 689.

[10] The statistical imbalance need not be so great as to constitute a prima facie case. *See Setser* v. *Novak Investment Co.*, 657 F.2d 962, 968 (8th Cir. 1981); *Detroit Police Officers Association*, 608 F.2d at 689, 690. In the context of consent decrees providing affirmative action relief, we interpret the disclaimer of wrongdoing to be an admission that there is a statistical disparity which the defendants cannot unequivocally explain, together with a reservation of the right to attempt to explain it at any other time. *See Alexandria*, 614 F.2d at 1365 n.15.

tive relief provisions must be reasonably related to the remedial purpose of correcting the racial imbalance in the workforce. *See Valentine* v. *Smith*, 654 F.2d 503, 510-511 (8th Cir. 1981); *Lehman* v. *Yellow Freight System, Inc.*, 651 F.2d 520, 526-527 (7th Cir. 1981); *Detroit Police Officers Association* v. *Young*, 608 F.2d 671, 694-698 (6th Cir. 1979), *cert. denied*, — U.S. —, 101 S.Ct. 3079 (1981); *United States* v. *City of Alexandria*, 614 F.2d 1358, 1366 (5th Cir. 1980); *Setser*, 657 F.2d at 968, 969. *See also United Steelworkers* v. *Weber*, *supra*. The terms of the decree cannot require the discharge of non-minority workers and their replacement with minorities. *Id.* The decree's provisions cannot bar absolutely the advancement opportunities of non-minorities. *Id.* Moreover, the decree must be a temporary remedy designed to terminate when it has eliminated the racial imbalance. *Id.* The decree cannot mandate the hiring or promotion of unqualified individuals. *Id.* Finally, the court shall retain jurisdiction over the administration of the decree and make such further orders as are necessary.

Specific race-conscious hiring and promotion goals and ratios are appropriate elements of consent decrees. The goal of achieving racial diversity in the top ranks of city government is not only reasonable, but a legitimate constitutionally permissible interest a city may pursue. *See Talbert* v. *Richmond*, 648 F.2d 925, 931 (4th Cir. 1981); *Detroit Police Officers Assoc.*, *supra*. This interest justifies individual consideration of race. No decision of the Supreme Court has ever adopted the proposition that the Constitution must be color-blind. *See Bakke*, 438 U.S. 265, 336 (1978); *Miami*, 614 F.2d at 1336. On the contrary, the Supreme Court has approved race-conscious affirmative action in a wide variety of situations where it is an attempt to ameliorate the effects of past discrimination. *See United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977) (reapportionment); *McDaniel* v. *Barresi*, 402 U.S. 39 (1971) (school desegregation); *Bakke*, 438 U.S. 265 (1978) (graduate school admissions policy); *Weber*, 443

U.S. 193 (1979) (admission to union training program); *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980) (government contracting).

The appropriateness of temporary race-conscious employment goals or ratios is a fact sensitive inquiry. The test is whether the technique is a reasonable response to the racial imbalance the decree was designed to erradicate. *See Alexandria*, 614 F.2d at 1363, 1366. Generally, there should be some relationship between the magnitude of the imbalance, the strength of the goals, and the reasonableness of the provision. Ratios are particularly appropriate where the racial imbalance is highly disproportionate. A "goal which seeks the same racial proportion among employees as in the labor force will ordinarily be reasonable." *Detroit Police Officers Assoc.*, 608 F.2d at 696; *Alexandria*, 614 F.2d at 1366, n.18.

Temporary hiring goals of 50% have been approved routinely as reasonable. *See, e.g., Weber*, 443 U.S. 193 (reservation of 50% of all openings in apprenticeship craft training program reasonable); *Vulcan Society*, 505 F.Supp. 955 (50% hiring ratio reasonable where minority representation in population is 16% while workforce representation is only 3%); *EEOC* v. *Bartenders International Union*, 22 EPD ¶ 30,700 (N.D. Cal. 1979) (50% of job referrals from craft union reasonable); *Alexandria*, 614 F.2d 1358 (50% hiring goal reasonable); *United States* v. *Jackson*, 519 F.2d 1147 (5th Cir. 1975) (50% hiring goal reasonable); *Firebird Society of New Haven* v. *New Haven Board of Fire Commissioners*, 66 F.R.D. 457 (D. Conn. 1975) (total freeze followed by 50% hiring reasonable where minority representation in workforce is 4% while minorities are 30% of the population); *Bolden* v. *Pennsylvania State Police*, 73 F.R.D. 370, *aff'd.* 578 F.2d 912 (3d Cir. 1978) (50% hiring goal reasonable). In *Morrow* v. *Crisler*, 491 F.2d 1053 (5th Cir.), *cert. denied*, 419 U.S. 895 (1974), the Fifth Circuit reversed an earlier panel decision which had affirmed an affirma-

tive action plan which relied upon the good faith of the defendants where there was gross minority underrepresentation in the employer's workforce. The en banc court ordered the district court to consider temporary 1 to 1 or 1 to 2 hiring, the creation of hiring pools, or a freeze on non-minority hiring.

Temporary promotional ratios are also reasonable. *See e.g., Baker*, 504 F.Supp. 841 (50% promotion ratio reasonable); *Dennison*, 658 F.2d at 695 (Consent decree which awarded 50% of all promotions to minorities reasonable); *Bolden*, 73 F.R.D. at 373-74 (33% promotion ratio reasonable); *United States* v. *Philadelphia*, 24 EPD ¶ 31,327 (E.D. Penn. 1980) (promotion of 17% of all incumbent female police officers reasonable); *Firebird Society*, 66 F.R.D. 457 (promotional goal of 33% for the position of lieutenant reasonable); *Jackson* 519 F.2d 1147 ("accelerated promotions" of incumbent blacks reasonable). In *American Telephone and Telegraph Co.*, 556 F.2d 167, the consent decree directed the Bell System Companies to establish goals and intermediate targets to promote the full utilization of all race, sex and ethnic groups in each of fifteen job classifications. The intermediate targets reflected the representation of such groups in the external labor market in relevant pools for each operating company's workforce. When any operating company was unable to achieve its intermediate target, the decree required it to depart from normal standards and select basically qualified candidates.

The final factor a court must consider is all objections to the decree and alternatives to the decree's provisions presented during the hearing. *Miami*, 614 F.2d at 1334; *American Telephone and Telegraph*, 556 F.2d at 178. The preliminarily approved decree is presumptively reasonable. *Philadelphia*, 24 EPD at 18,046; *Miami*, 614 F.2d at 1333. Consequently, one objecting to the decree bears the heavy burden of demonstrating that the decree is unreasonable. *Philadelphia*, 24 EPD

at 18,047; *Miami*, 614 F.2d at 1334. A decree may be finally approved over the objections of class members and non-minorities who are affected by it. *See Dennison*, 658 F.2d at 696; *Holmes* v. *Continental Can Co.*, 25 EPD ¶ 31,490 (N.D. Ala. 1980). If the decree is rejected, the principaled reasons for the rejection must appear on the record. *Miami*, 614 F.2d at 1333; *Philadelphia*, 24 EPD at 18,047. A decree should be rejected only after the court informs the parties of its precise concerns and gives them an opportunity to reach a reasonable accommodation. *Miami*, 614 F.2d at 1333.

The court should not attempt to impose its perspective on the parties. The court should only determine whether the decree is within the range of reasonableness. Some reliance may be placed on the ability of competent counsel to accurately assess the strengths and weaknesses of each litigant's case. *See Cotton*, 559 F.2d at 1330; *FMC Corp.*, 528 F.2d at 1173. The decree is a compromise. Neither litigant obtained all that they had hoped to gain initially through litigation.

A principal purpose of Title VII is to induce voluntary race-conscious affirmative action. *Detroit Police Officers Assoc.*, 608 F.2d at 690. Courts have placed a high premium on the voluntary settlement of Title VII actions. *See, e.g., Alexander* v. *Gardner-Denver Corp.*, 415 U.S. 36, 44 (1974); *Miami*, 614 F.2d at 1331-33. *Dennison*, 658 F.2d at 696; *Village of Arlington Heights*, 616 F.2d at 1014-1016. *Cotton*, 559 F.2d at 1331; *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 846 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *Hutchings* v. *United States Industries, Inc.*, 428 F.2d 303, 309 (5th Cir. 1970). Consent decrees enhance the possibility of compliance with Title VII and other employment discrimination laws. *Id.* Consent decrees may produce more favorable results than more sweeping judicially imposed orders that might risk opposition and resistance. *Id.* Consent decrees also reduce the cost of litigation, engender judicial economy,

and vindicate an important societal interest in affirmative action.[11] *Id.*

On appeal, the standard of review is abuse of discretion. *Dawson* v. *Pastrick*, 600 F.2d 70, 75 (7th Cir. 1979); *Cotton*, 559 F.2d at 1331, *Village of Arlington Heights*, 616 F.2d at 1015. Due deference will be given the trial court's greater familiarity with the strategy and the relative strengths of each litigant's case. *See Alexandria*, 614 F.2d at 1362.

In the instant case, all pretrial discovery had been completed. Thus, counsel and the court were in an excellent position to assess the relative strengths of each litigant's case. The parties agreed to the terms of the 1980 Decree. The court found that there was no evidence of collusion, stating "no parroting" had occurred throughout the pretrial period. The 1980 Decree represents a reasonable compromise of their competing interests. The City relinquished no more control over its personnel decisions than was absolutely necessary to avoid a trial on the merits.[12] Plaintiffs did not agree to the decree until it became apparent that they had obtained substantially all they could have obtained, given the risks of litigation.

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[11] "Settlement agreements should . . . be upheld whenever equitable and policy considerations so permit. By such agreements are the burdens of trial spared to the parties, to other litigants waiting their turn before overburdened courts, and to citizens whose taxes support the latter. An amicable compromise provides the more speedy and reasonable remedy for the dispute." *Aro Corp.* v. *Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir.), *cert. denied* 429 U.S. 862 (1976).

[12] An employer, such as the City, is unlikely to have an over-compromising attitude toward affirmative action. Employers recognize, as does the dissent, that an inequitable or overly zealous affirmative action plan may create racial tension in the workplace. The presence of this tension may create dissention and a general non-productive work climate. This unfortunate, but real potential for non-minority backlash is a potent disincentive which restrains employers from agreeing to "too" sweeping affirmative action. However, it is doubtful that this backlash is any less counter-productive than that created by perpetual discriminatory employment policies. More significantly, however, such considerations cannot justify failure to sustain an otherwise reasonable consent decree.

The adequacy of the 1980 Decree can be assessed by considering the statistical evidence of discrimination in the record. This statistical evidence is sufficient to create a strong prima facie case of racial discrimination. In fact, the trial court thought that the evidence was so compelling that it could take judicial notice of the discriminatory employment practices of the City.[13] Minorities were excluded from meaningful participation in the Memphis Fire Department for decades. The goals embodied in the decree are reasonable. However, the goals are merely an adequate response to the gross underutilization of minorities within the Fire Department. The promotion and hiring goals embodied within the 1980 Decree supplement the relief provided in the 1974 Decree. The 1974 Decree contemplated the imposition of these goals if the utilization of minorities was not substantially increased. This contingency in the 1974 Decree is an additional factor enhancing the reasonableness of the 1980 Decree. Significantly, no class member objected to the terms of the 1980 Decree.

The court also considered the interests of non-minorities. The affirmative action provisions of the 1980 Decree do diminish the promotional expectations of non-minorities. A simple reduction in the "expectations" does not, however, necessarily make a consent decree unreasonable. For example, in *Weber*, 443 U.S. 193, the expectations of non-minorities were adversely affected, yet the affirmative action plan was legal. In the instant case, the harm suffered by incumbent non-minority employees because of the promotional goal is de minimus. Many minorities would have been

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[13] Statistical evidence of racially disparate impact may establish a statutory violation of Title VII. *See Detroit Police Officers Assoc.*, 608 F.2d at 686; *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339 (1977). Under some circumstances such evidence could demonstrate a constitutional violation. *See Village of Arlington Heights* v. *Metropolitan Housing Corporation*, 429 U.S. 252, 266 and n.13 (1972).

promoted even absent the consent decree. In fact, absent discrimination, the minority promotion rate should approximate the percentage of minorities in the community.[14] *See International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 340 n.20 (1977); *Detroit Police Officers Assoc.*, 608 F. 2d at 696-97. Minorities represent 35% of the Memphis Community, therefore, over the long-run the minority promotion rate should exceed the 20% promotion ratio in the 1980 Decree. Viewed in this light, the promotion ratio in the 1980 Decree is a floor and not a ceiling on minority promotions. The consent decree embodies a minority promotion ratio which is *less* than the 35% minority promotion ratio which presumptively would be the norm absent the City's past employment practices. Non-minorities allege the 1980 Decree's 20% promotion goal unduly interferes with their expectation of promotion. It appears, however, that the expectation of non-minorities is based upon a pre-decree minority promotion ratio which presumptively would have been significantly higher had the City's employment practices been non-discriminatory. The 1980 Decree eliminated only *a portion* of the promotional expectations of non-minorities which presumptively were based on the City's discriminatory promotional practices.

The court also held a hearing to enable the proposed intervenors to air their objections to the 1980 Decree. The proposed intervenors suggested that the court restructure the Fire Department, institute a constructive promotion procedure, or create more upper management positions so the promotional expectations of non-minorities would not be diminished. The district court rejected these alternatives. The court was correct in summarily rejecting the alternatives suggested by the intervenors. *See Philadelphia*, 24 EPD at 18,048. The court had no authority to restructure the Memphis Fire Department. *See National League of Cities* v. *Usery*, 426 U.S.

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[14] This court assumes the rate of minority participation in the labor force equals the percentage of minorities in the Memphis community.

833 (1976), *on remand sub nom., National League of Cities* v. *Marshall*, 429 F.Supp. 703 (D.C. Col. 1977).

Finally, the court determined that the decree was reasonable. We agree. The decree was reasonably related to correcting the underutilization of minorities in the Memphis Fire Department. The decree did not require the discharge of non-minority employees and only encompassed qualified minorities. Moreover, the decree is temporary and does not constitute an absolute bar to the advancement of non-minorities. More importantly, the court has retained jurisdiction to enter such further orders as are necessary to effectuate the purposes of the decree while not unduly trammeling the interests of non-minorities.

OPERATION OF A CONSENT DECREE

A.

A consent decree is essentially a contractual agreement subject to continued judicial policing. The terms of the decree, unlike those of a simple contract, have unique properties. A consent decree has attributes both of a contract and of a judicial act. *See United States* v. *Motor Vehicles Manufacturers Association of United States, Inc.*, 643 F.2d 644, 648 (9th Cir. 1981); *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 236, n.10 (1975). Consent decrees are construed for enforcement purposes as contracts. *See ITT Continental Baking Co.*, 420 U.S. at 238. *Brown* v. *Neeb*, 644 F.2d 551 (6th Cir. 1981); *Strouse* v. *J. Kinson Cook, Inc.*, 634 F.2d 883, 885 (5th Cir. 1981). Aids such as the circumstances surrounding the formation of the decree help determine the purpose for which the decree was entered. *See Brown* v. *Neeb*, 644 F.2d at 562; *United States* v. *Bechtel Corp.*, 648 F.2d 660, 665 (9th Cir. 1981), *cert. denied*, 102 S.Ct. 638 (1981); *ITT Continental Baking Co.*, 420 U.S. at 238. The binding substantive commands of a consent decree are embodied

within the decree's "four corners". *See United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971); *Strouse*, 634 F.2d at 885. A decree embodies the legal constraints which govern the behavior of the parties during the life of the decree. *See ITT Continental Baking Co.*, 420 U.S. at 236. In interpreting a decree, courts may not depart from its "four corners" unless its language is ambiguous. *See Id.*; *Motor Vehicles Manufacturers Assoc.*, 643 F.2d at 648.

B.

A decree is always specifically enforceable as written. *See ITT Continental Baking Co.*, 420 U.S. at 238; *Miami*, 614 F.2d at 1333; *Strouse*, 634 F.2d at 885. The subject matter of a decree in an employment discrimination action, the right to litigate the issue of discrimination, is always unique. Both parties relinquish this valuable right in reliance upon the decree. Plaintiff forgoes the right to be made "whole" by proving a violation of Title VII.[15] A defendant, on the other hand, relinquishes the right to rebut the allegations of discrimination and avoid the affirmative responsibilities imposed by a judicial finding of discrimination. A party cannot simultaneously benefit from a decree and ignore its corresponding affirmative obligations. *See Strouse*, 634 F.2d at 886. The specific performance ordered should ordinarily accomplish that progress which would have occurred but for a party's failure to abide by the terms of the decree. *See EEOC* v. *Local Union No.* 38, 25 EPD ¶ 31,553 (N.D. Cal. 1981); *Bolden*, 73 F.R.D. at 370. A trial court has continuing jurisdiction to modify a decree should its operation become unreasonable. *See United States* v. *Chicago*, 663 F.2d 1354 (7th Cir. 1981) (en banc); *Miami*, 614 F.2d at 1333-34.

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[15] If a violation had been established, the remedy would have embodied retrospective as well as prospective relief. *See Albmarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1974).

Quite apart from the contractual mandate of specific performance, the court has an independent duty to ensure that the terms of the decree are effectuated. The reasonableness determination is a judicial act and a final order of the court. This determination places the weight and authority of the court behind the terms of the decree. An approved consent decree is not simply a compact between former litigants, rather it is a court order. Consequently, a court has an affirmative duty to protect the integrity of its decree. This duty arises where the performance of one party threatens to frustrate the purpose of the decree.[16] For example, in *Local Union No. 38*, 25 EPD ¶ 31,553, a union was held in contempt for failing to comply with the terms of a consent decree which it had entered. The court increased the number of minorities affected by the decree's affirmative action plan in the amount which the union had failed to meet the plan's goals. In *EEOC v. Bartenders International Union, Local No. 41*, 22 EPD ¶ 30,700 (N.D. Cal. 1979), the court extended the duration of a consent decree and increased the percentage goal of integration where the union fell short of meeting its minority membership goal, the statistical disparity between minority and non-minority in the union workforce continued to exist, and the long-range goal of the decree had not been met. In *Bolden*, 73 F.R.D. 370, the court modified a consent decree after an unanticipated economic crisis prevented the employer from being able to afford to comply with the terms of a decree which mandated affirmative action. The court increased the minority hiring goal from 33 to 50 percent and the minority promotion ratio from 25 to 33 percent.[17]

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[16] Absent extraordinary circumstances, the court should act only on the motion of the parties.

[17] We express no opinion on whether the goals contained in the instant decree should be increased at the conclusion of the unanticipated economic crisis in Memphis.

C.

The operation of the promotion section of the 1980 Decree does not constitute unconstitutional reverse discrimination. The proposed intervenors suggest that monetary damages, constructive promotions, and front pay are appropriate compensation for non-minority employees who allegedly are adversely affected by the decree's operation. The district court rejected this argument as substantively incorrect. We agree.

Compensatory relief is generally intended to make a litigant whole for any losses occasioned by wrongdoing. Thus, the proposed intervenors implicitly contend that the operation of the decree constitutes a compensable wrong. We hold that a reasonable consent decree does not constitute a compensable wrong. In fact, a reasonable consent decree does not adversely affect *any* legally protected interest of a non-minority. *Equal Employment Opportunity Commission* v. *McCall Corporation*, 633 F.2d 1232 (6th Cir. 1980) is instructive on this point. In *McCall*, male carloaders alleged that a consent decree which granted retroactive seniority to female employees constituted an act of discrimination. Judge Kennedy, speaking for this Court, held:

> "Acceptance of plaintiffs' theory that a conciliation agreement and consent decree resulting from a Title VII action can itself be an act of discrimination would create major problems.
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> This court is convinced that the consideration of a conciliation agreement which results in a consent decree as an act of discrimination against employees not benefitted by that agreement would create a situation in which each settlement would spark new rounds of litigation, settlement of claims would be discouraged, and the courts would continually be faced with stale claims. Consequently, we hold that conciliation agreement resulting in consent decrees may not be considered independent acts

> of discrimination, as a matter of law, unless there are allegations of bad faith in making the agreement, that is allegations that the agreement was not a bona fide attempt to conciliate a claim but rather an attempt to bestow unequal employment benefits under the guise of remedying discrimination." *Id.* at 1238; *Freeze* v. *Aro, Inc.*, 503 F.Supp. 1045, 1047 (E.D. Tenn. 1980). *Accord, Setser* v. *Novack Investment Co.*, 657 F.2d 962, 970 (8th Cir. 1981) (en banc).

A consent decree may be attacked only on the ground that its substantive provisions unlawfully infringe the rights of the complainant. *See Society Hill Civic Assoc.* v. *Harris*, 632 F.2d 1045, 1059 (3d Cir. 1980). We hold that a reasonable consent decree which embodies an affirmative action plan does not affect any legally protected interest of non-minorities. *See McCall*, 633 F.2d at 1238. Therefore, reverse discrimination challenges to reasonable consent decrees are impermissible collateral attacks. *See Dennison*, 658 F.2d at 695. *Prate* v. *Freedman*, 430 F.Supp. 1373 (W.D. N.Y.), *aff'd.*, 573 F.2d 1294 (2d Cir. 1977), *cert. denied*, 436 U.S. 922 (1978); *O'Burn* v. *Shapp*, 70 F.R.D. 549 (E.D. Pa.), *aff'd.*, 546 F.2d 417 (3d Cir. 1976), *cert. denied*, 430 U.S. 968 (1977). *See also, Miami*, 614 F.2d at 1329 (Consent decree cannot be challenged by a party whose rights are not affected by it).

The proposed intervenors have not alleged that the 1980 Decree was the product of collusion. Indeed, this record would not support such an allegation. Moreover, the 1980 Decree is reasonable. Thus, the proposed intervenors' action is an impermissible collateral attack. *See Dennison*, 658 F.2d at 695-96.

Moreover, awarding compensatory relief to non-minority employees would impose conflicting or inconsistent obligations on the City. This is particularly true of the constructive promotion suggestion. Under this alternative, each time the City

attempted to promote minorities, it would be required to provide an equivalent amount of compensation to a non-minority employee who allegedly would have been promoted but for the decree. This extra compensation would drastically increase the cost of each promotion and the cost of complying with the 1980 Decree. This increased cost would destroy a primary incentive which motivated the City to enter the 1980 Decree. Thus, permitting the proposed intervenors to sue for compensation would be inimical to the policy of encouraging the settlement of Title VII actions.

In addition, the compensatory relief sought by the proposed intervenors frustrates the purpose of the decree. The purpose of the decree is to correct the effects of those past employment practices of the City which may have been racially discriminatory. The decree provides that minorities are entitled to certain affirmative treatment and consideration in future promotions because of the City's past employment practices. Evidence contained in this record not only supports this entitlement, but is sufficient to establish a prima facie case of racial discrimination. The decree is designed to correct past employment practices which illegally benefited non-minorities. The proposed intervenors seek to confer indirectly the benefits of the decree on non-minorities. Therefore, the relief sought by the proposed intervenors is patently inconsistent with the purpose of the decree.

Finally, if the consent decree could constitute an actionable wrong, the City would be subject to dual obligations. The failure to enter a consent decree would leave the City potentially liable in the Plaintiffs' employment discrimination action. On the other hand, the proposed intervenors imply that compliance with the decree would subject the City to "reverse discrimination" suits seeking comparable relief for non-minorities. The proposed intervenors' position places the City in a "Catch-22" position of incurring liability for employment discrimination without regard to the action taken. The

absurdity of placing employers in this position has been noted by several courts. *See Telephone Workers Union of New Jersey Local 827* v. *New Jersey Bell Telephone*, 450 F.Supp. 284, 298 (D. N.J. 1977), *aff'd.* 584 F.2d 31 (1978); *Dennison*, 658 F.2d at 695-6; *Hunter* v. *St. Louis-San Francisco Ry. Co.*, 639 F.2d 424, 425 n.2 (8th Cir. 1981). *See also Alexandria*, 614 F.2d at 1366.

The proposed intervenors contend that this potential double liability is necessary to ensure that an employer bears the full price of its past wrongdoing. Permitting double liability in this situation would clearly maintain the status quo. At a minimum, double liability would so escalate the cost of affirmative action that an employer's ability to implement an affirmative action plan would be severely crippled. As a result, affirmative action would be impractically expensive.

It is unfortunate that the City engaged in the employment practices which precipitated the decree. However, non-minorities benefitted from, practiced, and acquiesced in those practices. The 1980 Decree is a reasonable means to correct the adverse effects which minorities shouldered as a result of those employment practices. The decree does not adversely affect any legally protected interest of non-minorities.

The proposed intervenors apparently agree that some action must be taken to ensure that discrimination does not prevent minorities from receiving a fair share of the economic opportunities available. They disagree, however, on the means selected to accomplish this end. The proposed intervenors assert that non-minorities are unhappy with the promotion section of the 1980 Decree. This temporary measure only partially realigns promotional expectations to reflect minority employment levels which would have occurred absent the discrimination. This realignment vindicates a societal interest in remedying the effects of racial and more than justifies the displeasure some non-minorities may experience. More-

over, the proposed intervenors disregard the fact that minorities may also be dissatisfied with the temporary relief afforded by the 1980 Decree. In fact, minorities may be less than totally satisfied that the remedial provisions of the decrees are adequate compensation for the many opportunities foreclosed to them for decades. The dissatisfaction which non-minorities and minorities may experience is inherent in the compromise which the 1980 Decree represents. A consent decree reached after negotiation and consultation is the preferred means of balancing the conflicting societal and individual interests inherent in any employment discrimination action. The only alternative to a consent decree is a costly and lengthy trial which would only confront the court with the difficult question of how much affirmative action must be imposed to correct the effects of past employment discrimination.

III. THE PRELIMINARY INJUNCTION

On May 4, 1981, the City announced that an unanticipated economic crisis required the layoff of certain personnel in nonessential services. The proposed layoffs were unprecedented in the City's history. The affirmative relief accomplished under the decrees would be severely eroded by the proposed layoff policy. Subsequently, the court granted an injunction preventing the City from applying the layoff policy in a manner which would reduce the percentage of minority employees in each job classification below that which existed before the layoffs were announced. The City and the Union brought this appeal. We must weigh whether the plaintiffs have shown a strong possibility of success on the merits, whether the plaintiff or defendant would suffer irreparable harm and whether the public interest warrants the injunction. *See, e.g., Mason County Medical Assoc.* v. *Knebel*, 563 F.2d 256, 261 (6th Cir. 1977). The standard of appellate review is

whether the district court abused its discretion in granting the preliminary injunction. *United States* v. *School District of Ferndale*, 577 F.2d 1339, 1360 (6th Cir. 1978), *on remand*, 460 F.Supp. 352, *vacated*, 616 F.2d 895 (6th Cir. 1980), *on remand*, 499 F.Supp. 367 (E.D. Mich. 1980).

Judge McRae did not abuse his discretion in granting the preliminary injunction. First, the statistics denoting the racial composition, hiring and promotion practices of the Fire Department adequately indicate the probability of plaintiff's success on the merits.[18] Moreover, the entry of the 1980 Decree constituted a "determination of probability of success on the merits." *Culbreath* v. *Dukakis*, 630 F.2d 15, 23 (1st Cir. 1980). Second, the proposed layoffs would irreparably harm minorities by preventing them from acquiring the experience necessary for supervisory positions. Finally, the injunction serves the public interest by not allowing unexpected events to eradicate the progress made pursuant to an affirmative action plan. *Brown, supra.* Racial diversity in the supervisory ranks of municipal government serving an urban multi-racial city is, as Judge Lively noted in *Detroit Police Officers Assoc.*, desirable and in the public interest. *See Talbert* v. *Richmond*, 648 F.2d 925, 931 (4th Cir. 1981).

IV. MODIFICATION OF A CONSENT DECREE

There are three grounds upon which a consent decree may later be modified. First, a decree may be modified in accordance with basic contract principles. *Brown*, 644 F.2d at 559-560. Moreover, Rule 60(b) provides relief from a consent decree upon a showing that the decree is void or is no longer equitable. Fed. R. Civ. P. 60(b)(4)(5). *See EEOC* v. *Safeway Stores, Inc.*, 611 F.2d 795, 799 (10th Cir. 1979), *cert. denied sub nom, Courtwright* v. *EEOC*, 446 U.S. 952 (1980); *Brown*,

[18] See Footnote 5.

644 F.2d at 560 n.17; *Philadelphia Welfare Rights Org'n.* v. *Shapp*, 602 F.2d 1114, 1120-21 (3d Cir. 1979), *cert. denied sub nom Thornburgh* v. *Philadelphia Welfare Rights Org'n.*, 444 U.S. 1026 (1980). A trial court's ruling on a Rule 60(b) motion will not be disturbed absent an abuse of discretion. *See Dawson* v. *Pastrick*, 600 F.2d 70, 75 (7th Cir. 1979); *Cotton* v. *Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977). Finally, a court of equity has continuing jurisdiction to modify a decree upon changed circumstances. *United States* v. *Swift & Co.*, 286 U.S. 106, 114-15 (1932); *Brown, supra.* Modification of a consent decree, of course, requires a full hearing and findings of fact. *United States* v. *Atlantic Refining Co.*, 360 U.S. 19, 23 (1959); *Hughes* v. *United States*, 342 U.S. 353, 357-58 (1952); *Brown*, 644 F.2d at 560.

A.

The 1980 Decree imposes a duty on the City to engage in certain affirmative action in its hiring and promotion decisions. The decree does not contain a provision which would prevent the operation of the decree if one party experiences an economic hardship. In April of 1981, the City experienced an unanticipated economic crisis. The City unilaterally determined that a reduction in the number of City workers could lessen the severity of the crisis. Alternative methods for meeting the crisis were available. The City had ultimate responsibility for determining: 1) that city-wide layoffs were the alternative which would most effectively relieve the crisis; and 2) which job classifications would be subject to the layoff policy. It is uncontroverted that the application of the layoff policy to the job classifications selected by the City would have virtually destroyed the progress belatedly achieved through affirmative action. The City contracted in the 1974 and 1980 Decrees to accomplish precisely that which the layoffs would destroy: a substantial increase in the number of minorities in supervisory positions.

The district court, sitting as a court of equity, had the equitable power to order specific performance of the terms of the 1974 and 1980 decrees. As noted, the 1980 Decree is based upon the mutual assent of the parties and a judicial determination of reasonableness. This Decree mandates an increase in the level of minority employment and promotion within the First Department. Minorities hired and/or promoted pursuant to the 1980 Decree were parties to and the intended beneficiaries of the 1980 Decree. Therefore, the City's announcement to these employees was in effect notice of the City's intended anticipatory repudiation of the 1974 and 1980 Decrees. The announcement notified Plaintiffs that 1) relief previously granted pursuant to the Decrees would be diminished; and 2) prospective relief under the Decrees would not be forthcoming.

In response to the City's announcement, the Plaintiffs sought to enjoin the proposed layoffs. However, it is apparent from Judge McRae's treatment of this case that he properly recognized that Plaintiffs did not seek to modify contractually the existing consent decrees. Instead, Plaintiffs merely sought to compel compliance with the terms and goals of the Decrees. Under the terms of the Decrees, the City was obligated to employ reasonable, good faith efforts to fulfill the goal of increasing minority representation in each job classification in the fire department to levels approximating the minority population represented in the civilian labor force in Shelby County.

The City's failure to fulfill its obligations under the Decrees would have subjected it to liability for violating both its contractual obligations and a judicial order. The City contends that the sole reason for the layoff proposal was economic hardship. This argument is meritless. It is hornbook contract law that economic hardship does not excuse performance under a contract. *See* J. Calamari and J. Perillo, *Contracts*, 491 (2d ed.). *Neal-Cooper Grain Co.* v. *Texas Gulf Sulphur Co.*, 508 F.2d 283 (7th Cir. 1974). Consequently, the decrees remained

specifically enforceable. *See ITT Continental Baking Co.*, 420 U.S. at 236. Plaintiffs were presumptively entitled to full performance of the terms of the Decrees. Therefore, the court's modification of the decree is simply an exercise of its equity jurisdiction to temporarily relieve the hardship on the City which strict compliance with the decrees would have caused. The modification allows the City to proceed with its layoff policy subject to reasonable deference to its obligations under the decrees. In our view, the court's decision to modify the Decrees is a reasonable accommodation of competing interests and obligations. The modification partially alleviates the City's misfortune, while protecting the integrity of the court's initial orders. The court gave due deference to the City in structuring its internal affairs. *See National League of Cities* v. *Usery*, *supra*.. Comity and an appreciation of federalism caused the court to exercise its equitable powers to apportion the burden of meeting the City's fiscal crisis on minorities and non-minorities alike. The court retains authority to mandate full compliance with the decrees should circumstances change.

B.

The relief granted under Fed. R. Civ. P. 60(b) is extraordinary and may be granted only upon a showing of exceptional circumstances. *Mayberry* v. *Maroney*, 558 F.2d 1159, 1163 (3d Cir. 1977); *Philadelphia Welfare Rights Org'n.*, 602 F.2d at 1119; *Brown*, 644 F.2d at 560, n.17. A change in the facts upon which the consent decree is based usually constitutes an exceptional circumstance. *See King-Seeley Thermos Co.* v. *Aladdin Industries, Inc.*, 418 F.2d 31, 35 (2d Cir. 1969), *on remand*, 320 F.Supp. 1156 (D. Conn. 1970). *See also Safeway Stores*, 611 F.2d at 800. A consent decree may also be modified "where a better appreciation of the facts in the light of experience indicates that the decree is not properly adapted to accomplishing its purposes." *Chance* v. *Board of Examiners*, 561 F.2d 1079, 1086 (2d Cir. 1977), *quoting King-Seeley*

Thermos Co., 418 F.2d at 35. The availability of relief under Rule 60(b) is not squarely presented on this appeal.[19] We, therefore, express no opinion on whether the 1980 Decree could have been modified pursuant to Rule 60

C.

A trial court has broad discretion in administering consent decrees. *See, e.g., Brown, supra; Safeway Stores*, 611 F.2d at 799; *American Telephone and Telegraph Co.*, 556 F.2d at 178. While acting within its equity jurisdiction, a trial court has continuing jurisdiction to modify a consent decree upon a showing that "changed circumstances" have transformed the original decree into an instrument of wrong. *See, e.g., United States* v. *Swift & Co.*, 286 U.S. 106, 114-115

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[19] We note that this court has previously endorsed the analysis of Rule 60(b) in *Philadelphia Welfare Rights Org'n.*, 602 F.2d at 1120-21:

> Any injunction imposing mandatory affirmative duties for the future involves elements of prediction. Whether the prediction as to achievability is made as a result of litigation or, as here, in a negotiated settlement, it will always be speculative to some degree. This is particularly the case when the defendants' ability to achieve compliance depends upon the receptivity of class members or other third parties not formally before the court. See Special Project, the Remedial Process in Institutional Reform Litigation, 78 Col.L.Rev. 784, 818-19 (1978). An approach to the modification of a complex affirmative injuction which over-emphasized the interest of finality at the expense of achievability would inevitably make defendants wary of any decree imposing more than the bare minimum of affirmative obligation. That wariness would, we think, tend to discourage the settlement of injunction actions by consent decree, a high price to pay for benefits of finality. Even where the decree is litigated, if the power to modify were too closely curtailed the defendants might seek, and the courts might tend to impose, minimum affirmative obligations, perhaps less than realistically achievable, for fear of becoming bound by unreasonable but unchangeable requirements. Where an affirmative obligation is imposed by court order on the assumption that it is realistically achievable, the court finds that the defendants have made a good faith effort to achieve the object by the contemplated means, and the object nevertheless has not been fully achieved, clearly a court of equity has power to modify the injunction in light of experience.

(1932); *Hughes* v. *United States*, 342 U.S. 353 (1952); *Brown supra*. The court's power to modify the terms of a decree should not be exercised lightly. *Swift & Co., supra*. Modification is proper where it has been demonstrated in an evidentiary hearing that new and unforeseen conditions have created a hardship. *See Brown*, 644 F.2d at 559. *Accord Chrysler Corp.* v. *United States*, 316 U.S. 556, 562 (1942) (The test is "whether the change served to effectuate or thwart the basic purpose of the original consent decree."). *See United States* v. *Chicago*, 663 F.2d 1354, 1360 (7th Cir. 1981) (en banc) (the standard for modification is not "based solely on hardship." It incorporates consideration of whether the purpose of the decree has been achieved). *See also Sarabia* v. *Toledo Police Patrolman's Ass'n.*, 601 F.2d 914, 916 (6th Cir. 1979). *See generally* Requests By The Government For Modification of Consent Decrees, 75 Yale L. Rev. 657 (1966); Flexibility and Finality in Antitrust Consent Decrees, 80 Harv. L. Rev. 1303 (1967). New and unforeseen conditions exist where there has been a fundamental change in the essential facts upon which the decree is based. *See Safeway Stores*, 611 F.2d at 800 (new, unforeseeable circumstances not present where "there is no evidence indicating that the facts – e.g., the nature and makeup of Safeway employees and operations – against which the decree and the interpreting order were framed have substantially changed.").

It is well settled that a court can modify a consent decree where layoffs caused by an unanticipated economic crisis threatens to frustrate the purpose of the decree. *See Brown*, 644 F.2d 551; *Bolden*, 73 F.R.D. at 371-72; *Castro* v. *Beecher*, 522 F.Supp. 873 (D. Mass. 1981). Thus, even if Judge McRae's decision is not construed as compelling compliance with the terms of the Decrees, there exists an independent justification for the modification.

In *Brown*, this court held that a trial court could exercise its inherent authority to modify a consent decree where an economic crisis unexpectedly caused the City of Toledo to lay

off firemen. The layoffs were a new and unforeseen changed circumstances which threatened to frustrate the purpose of the *Brown* decree by destroying its mandated affirmative action. The nature and racial composition of the Toledo Fire Department would also have been radically altered by the layoffs.

The factual situation which Judge McRae faced was virtually identical to that which confronted Judge Young in *Brown*. Judge McRae specifically found that: 1) the proposed layoffs were an unexpected circumstance not anticipated by the parties when they entered the decree; 2) the purpose of the 1980 Decree was to correct the past hiring and promotion practices of the City through affirmative action; and 3) the proposed layoffs would have a devastating and retrogressive effect on the affirmative action mandated in the 1974 and 1980 Decrees. These findings have not been challenged on appeal. The findings are not clearly erroneous.

The proposed layoffs would impose an undue hardship on Plaintiffs. The Plaintiffs have relied on the affirmative action provisions of the 1980 Decree. Thus, they have foregone their right to litigate the City's past employment practices and possibly obtain greater relief. The proposed layoffs would wrench the belated relief provided by the 1980 Decree from the Plaintiffs. The City unilaterally selected the job classifications in the Fire Department which would be affected by the proposed layoffs. The job classifications selected were those where minorities had recently made the most gains under the affirmative action provisions of the 1974 and 1980 Decrees. Judge McRae was correct in not allowing the City to eradicate the belated affirmative action it had contracted to accomplish in the 1974 and 1980 Decrees. Judge McRae did not issue a blanket order enjoining the layoff of all minority workers. Instead, the court merely prevented the City from reducing the percentage of minorities in each job classification. Judge McRae did not abuse his discretion in modifying the consent decree and enjoining the City from reducing the percentage of blacks in certain job categories within the City Fire Department.

V. THE SENIORITY SYSTEM

The city and the Union both assert that the trial court abused its discretion in modifying the 1980 Decree. Allegedly, the modification impermissibly awarded "constructive seniority" to minorities in violation of *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747 (1976) and *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), *on remand sub nom., EEOC* v. *T.I.M.E. – D.C. Freight, Inc.*, 659 F.2d 690 (5th Cir. 1981). In *Franks*, the Supreme Court held that retroactive seniority may be granted to individuals by a court only upon a showing of post-Act discrimination against the particular individual. *Teamsters* held that § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), immunizes "bona fide" seniority systems which perpetuate the effects of discrimination which occurred prior to the effective date of the act. Assuming without deciding the Firefighters Union is recognized as such under Tennessee law,[20] the City's and the Union's reliance on *Teamster's* and *Franks* is misplaced.

A court does not abuse its discretion in modifying or approving a consent decree which conflicts with the provisions of a collective bargaining agreement.[21] At least three theories have been advanced which indicate that a consent decree can alter existing seniority provisions over the objection of an

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[20] Plaintiffs contend that *Teamsters* is inapposite because the collective bargaining agreement between the City and the firemen is void and unenforceable under Tennessee law. *See Keeble* v. *City of Alcoa*, 204 Tenn. 286, 319 S.W.2d 249 (1958). Consequently, the trial court's modification of the layoff procedure did not violate a valid collective bargaining agreement. We need not, and do not decide this issue.

Plaintiff has also attempted to distinguish *Teamsters* by raising the issue of whether Firefighters Local Union 1784, a union formed after the effective date of Title VII, can be bona fide. This issue is before the Supreme Court. *See Patterson* v. *American Tobacco Co.*, 634 F.2d 744, (4th Cir. 1980), *cert. granted*, 49 U.S.L.W. 3931 (June 15, 1981). We, therefore, do not decide this issue.

[21] Circuit Judge Brown and District Judge Wiseman took a contrary view in *Brown, supra*. It also appears that Circuit Judge Martin also disagrees with my view. I have taken this opportunity to fully explain my position and the substantial case authority in support of it.

adversely affected union. Each of the theories and the circuit courts which espouse them are described below.

A.

The settlement theory allows a consent decree to alter existing seniority provisions. The settlement theory is epitomized by *Airline Stewards and Stewardesses Association, supra*. There the plaintiffs, a class of former female flight attendants, alleged that the defendant violated Title VII. After the plaintiffs were granted summary judgment, the parties reached a settlement during the appellate briefing process. That settlement provided *inter alia* that the plaintiffs would receive full retroactive "occupational seniority" upon reinstatement. The exclusive bargaining agent for American Airlines attendants intervened and objected to this provision of the settlement. The trial court, however, approved the settlement.

On appeal, the Seventh Circuit rejected the argument that *Teamsters* required each plaintiff to prove that she would have continued in her employment but for the defendant's wrongful termination. The court held that:

> "We believe that the issues raised by the intervenor should not be decided on the basis of Title VII law, but rather must be decided on the basis of legal principles regulating judicial review of settlement of agreements.
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> It is a well-settled principle that the law generally favors the encouragement of settlements. (citation omitted) That general rule has been recognized as applicable to settlements in Title VII cases. *Patterson* v. *Newspaper & Mail Deliverers Union of N.Y. & Vicinity*, 514 F.2d 767, 771 (2d Cir. 1975). In fact, one court has concluded that it is "the clearly expressed intent of that Act to encourage settlements." *Flinn* v. *FMC Corp.*, 528 F.2d 1169, 1174 (4th Cir. 1975). In addition, it is generally

recognized that settlements are entered into because of "the very uncertainties of outcome in litigation, as well as the avoidance of wasteful litigation and expense . . ." *Florida Trailer & Equipment Co.* v. *Deal*, 284 F.2d 567, 571 (5th Cir. 1960). Based on these considerations, this court has held that a district court in reviewing a settlement agreement "should not attempt to decide the merits of the controversy . . . [because] [a]ny virtue which may reside in a compromise is based upon doing away with the effect of such a decision." *Patterson* v. *Stovall*, 528 F.2d 108, 114 (7th Cir. 1976).

Applying these general principles to this case, we believe the district court correctly declined to decide the merits of each of the plaintiffs' claims. Intervenors essentially ask this court to require in excess of 100 mini-trials on issues dealing with the adequacy of each plaintiff's complaint and the availability of defenses. It seems to us beyond serious dispute that no reasonable parties are going to settle any case if an intervenor can force them to litigate separately the merits of each claim. The rule urged by the intervenor would most seriously discourage efforts to settle Title VII cases, and we refuse to sanction such a result. *Id.* at 963-64.

In *Safeway Stores*, the question presented was whether to modify a consent decree. Although the Tenth Circuit held the decree could not be modified, the court did endorse the rationale underlying the Seventh Circuit's decision in *Airline Stewards and Stewardesses, supra*. In *dicta* the court stated:

"*Teamsters* prohibits abrogation of a seniority system only if that system is bona fide. Because this case was never litigated, there has been no determination that Safeway's seniority system is bona fide. Intervenors would have us assume at this point that the system was bona fide, or at the least, remand the case for a hearing and determination. This we decline to do. The policy

> of voluntary settlement is so important to the enforcement of Title VII would be seriously undermined if the approving court were required to establish the facts underlying the parties' positions before approving a consent decree. The power to compromise exists partially because of the uncertainties and expense typical of adversary hearing and judicial determinations of fact. *West Virginia* v. *Chas. Pfizer & Co.*, 440 F.2d 1079, 1085-86 (2d Cir.), *cert. denied*, 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed. 2d 115 (1971). We concur with the district court, "A Consent Decree would be worthless if it could be attacked on the ground that had the Court made a particular determination, such relief would then not be statutorily available." *Id.* at 801.

We adopt the position of the Seventh Circuit in *American Airline Stewards and Stewardesses* and the Tenth Circuit in *Safeway Stores*. A strong policy favoring voluntary settlements is embodied within Title VII. *E.g., Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974), *on remand*, 8 FEP 1153, *aff'd.*, 519 F.2d 503 (10th Cir. 1975), *cert. denied*, 423 U.S. 1058 (1976). *Airline Stewards and Stewardesses*, 573 F.2d at 963; *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1976), *cert. denied sub nom National Organization for Women, Inc.* v. *United States*, 425 U.S. 944 (1976). This policy would be seriously undermined if the facts underlying each parties' positions were required to be established. Accordingly, the trial court's determination that the seniority provisions were non-bona fide is vacated. The modification of the consent decree was not error, even though the Union's seniority system may have been affected.

B.

My opinion in *Brown* endorsed a second basis for holding that a consent decree can modify an existing seniority system. The theory's premise is that a consent decree, the preferred

means of resolving an employment discrimination suit, does not decrease the power of a court to order relief which implicates the policies of Title VII and 42 U.S.C. §§ 1981 and 1983. This theory has been approved by the Third Circuit in an earlier decision, *EEOC* v. *American Telephone and Telegraph Co.*, 419 F.Supp. at 1038-1040, *aff'd.*, 556 F.2d 167 (3d Cir. 1977). In *American Telephone and Telegraph*, Judge Higginbotham reasoned as follows. First, he noted that had plaintiff's allegation been established, the court would clearly have had the power to modify the existing seniority system to require affirmative action in promotions and transfers. He also noted that Congress had selected cooperation and voluntary compliance as the "preferred means" of achieving the equal employment opportunity policies of Title VII. *Alexander, supra* at 44. Finally, he concluded:

> Since . . . [the consent decree] is the product of cooperation and voluntary (though possibly grudging) compliance, it is a particularly striking example of the successful use of the means preferred by Congress for the achievement of Title VII's goals. In my judgment, then, it would frustrate the purposes of Title VII to treat the absence of evidence about AT&T's discrimination in transfer and promotion policies, and AT&T's denial of liability for such discrimination, as insuperable obstacles to the ordering of affirmative action in transfers and promotions. I decline to do so. For the remainder of this opinion, therefore, I shall treat the allegations of the complaint with respect to transfer and promotion as if they had in fact been proved at trial. To approach them in any other way would make a mockery of the "preferred means" chosen by Congress to effectuate the goals of Title VII.

My reasoning in *Brown* parallels that of Judge Higginbotham in *American Telephone and Telegraph, supra*. In *Brown*, the Supremacy Clause enabled the trial court to over-

ride the conflicting provisions of a seniority system and Ohio law because the case had been brought pursuant to 42 U.S.C. §§ 1981 and 1983, as well as Title VII. In the instant case, the Stotts complaint alleged violations of 42 U.S.C. §§ 1981 and 1983 in addition to Title VII. If a violation of 42 U.S.C. § 1983 had been established, the court would have had the authority to invoke the Supremacy Clause to override the Union's seniority provisions and state law. *See, e.g., Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971); *Brown, supra*. It would be incongruous to hold that the use of the preferred means of resolving an employment discrimination action decreases the power of a court to order relief which vindicates the policies embodied within Title VII and 42 U.S.C. §§ 1981 and 1983. We, therefore, refuse to do so. The trial court had authority to override the Firefighter's Union seniority provisions to effectuate the purpose of the 1980 Decree.

C.

The third basis for approving a consent decree which conflicts with the provisions of a collective bargaining agreement is represented in *Sisco* v. *J. S. Alberici Construction Co., Inc.*, 655 F.2d 146 (8th Cir. 1981). In *Sisco*, the Eighth Circuit held that an employer can temporarily override the provisions of a collective bargaining agreement pursuant to a valid affirmative action plan. The employer, Alberici, unilaterally adopted an affirmative action plan to comply with the federal contract regulations. The plan established a 10 percent goal for the number of minority hours of employment on each of the Alberici's projects.

Clyde Sisco, a white male, was employed as an ironworker on the Post Office project. He also held the position of union steward. During the course of work on the project, Alberici determined that it did not need four ironworkers. However, to maintain compliance with the goals set in federal

regulations, a cutback in its force required the maintenance of at least one minority ironworker on the site. Consequently, Sisco and another white ironworker were laid off, while the only black ironworker and the crew foreman, a white male, were retained. Sisco protested this action and informed Alberici that under the Ironworkers Collective Bargaining Agreement, Sisco, as union steward, was entitled to special treatment. Under the Agreement, the steward is supposed to be "the last man laid off." Subsequently, he brought suit, alleging his removal from the Post Office Project violated Title VII and 42 U.S.C. § 1981.

The court held:

> "It [Alberici] was under pressure from government officials to improve its percentage of minority hours worked. There was a history of exclusion of black workers from the ironworkers' trade in St. Louis. Alberici had decided, for reasons wholly unrelated to race or to Sisco personally, to reduce its force of ironworkers at the Post Office from four to two. In order to accomplish that goal without further worsening its ratio of minority hours, the black ironworker (who had been on the site longer than Sisco and whose qualifications are not questioned) had to be retained. Of the two employees left, one was white. The St. Louis Plan [the affirmative action plan] was temporary, in the sense that its goals were expressed in terms of percentages of hours worked; once the percentages were met, no further action by the company was required. Sisco was not replaced by a new black worker. A qualified black employee with more seniority on the job site was simply retained in preference to Sisco and another white man. For these reasons, we hold that Alberici's initial decision to remove Sisco from the Post Office job was not unlawful." *Id.* at 149. *See Savannah Printing Specialties & Paper Products Local 604* v. *Union Camp Corp.*, 350 F.Supp. 632 (S.D. Ga. 1972).

The Eighth Circuit's analysis in *Sisco* indicates that the City would have, at Plaintiff's urging, modified the provisions of the collective bargaining agreement to accomplish the goals set out in the 1980 Decree without violating Title VII or 42 U.S.C. § 1981. The City specifically empowered the trial court to enter "such further order as may be necessary or appropriate to effectuate the purpose of this decree." Consequently, the trial court could use this derivative authority to temporarily override the provisions of the Union's collective bargaining agreement.

VI. CONCLUSION

Judge McRae has at all times during this very difficult and complex case displayed sound reasoning, restraint and wisdom in his actions. The balance he struck between the interests of the City, the Union, incumbent non-minority employees, and minorities who have relied upon the consent decree is appropriate and consistent with the law. Judge McRae did not abuse his discretion in approving the 1980 Decree or in modifying the decree to enjoin the City from destroying the belated affirmative action accomplished under the decrees. Accordingly, the judgment of the district court is affirmed.

BOYCE F. MARTIN, JR., Circuit Judge, concurring in part, dissenting in part. I write separately because I can concur only in the result. I agree that the District Court properly enjoined the City of Memphis from laying off black firefighters on the basis of city-wide seniority. In my view, the plaintiffs satisfied the traditional prerequisites for injunctive relief, and the District Judge did not abuse his discretion in granting plaintiffs the temporary relief which they sought. I also agree that the District Court erroneously determined that the seniority system was not bona fide.

However, I can agree with only one of the theories Judge Keith espouses to justify modification of the consent decree by injunction. Judge Keith is correct in stating that a consent decree is essentially a contract between adversaries to end litigation and settle differences. As such, a decree is subject to interpretation and construction as a contract. Unfortunately, the parties did not foresee the financial crisis which required massive layoffs. The decree therefore contains no provision that could be construed either to prohibit or permit layoffs according to city-wide seniority.

However, the decree contains the following provision whereby the parties agreed that the District Court should retain jurisdiction over the parties: "for such further orders as may be necessary or appropriate to effectuate the purposes of this decree." In essence, this provision is boiler-plate language which recognizes that the District Court has the power to modify the consent decree in light of changed circumstances, in order to preserve the level of benefits procured through the decree. I disagree with Judge Keith to the extent he concludes that this clause gives the District Court "derivative authority" to modify the provisions of the Union's collective bargaining agreement. However, to the limited extent that Judge Keith concludes that the District Court did not abuse its discretion in protecting the status quo in the Fire Department by injunction, I concur.

The District Court's decision to enjoin imminent layoffs was made after an evidentiary hearing and was based on its assessment that the decree would be vitiated by the impending layoffs. I believe that a District Court should be cautious in modifying a consent decree, especially if such action would cause the parties to assume obligations for which they have not contracted. Judge Brown, speaking for himself and Wiseman, the majority of the panel, articulated this concern in his special concurrence in *Brown* v. *Neeb*, 644 F.2d 551, 565 (6th Cir. 1981):

> Because the City is being required to pursue a course of action that it has not, by the consent decree, contracted to follow, and because liability has never been established, it seems to me that the district court should take particular care to exercise judicial restraint in modifying the consent decree to overrule the decision of the elected City officials and their appointees concerning the proper way to meet this financial crisis.

These considerations apply with equal force to the circumstances of the present case; and based upon the facts found by the District Court, I cannot say that its decision to enjoin impending layoffs was an abuse of discretion.

I disagree with Judge Keith's statement that: "a consent decree can alter existing seniority provisions over the objection of an adversely affected union." As support for this statement, Judge Keith reasons that this Court held in *Brown* that "the Supremacy Clause enabled the trial court to override the conflicting provisions of a seniority system and Ohio law because that case had been brought pursuant to 42 U.S.C. §§ 1981 and 1983 as well as Title VII." I cannot agree that his statement accurately reflects this Court's holding in *Brown*. Although Judge Keith reached this conclusion in his opinion in that case, Judge Brown expressly rejected it in his special concurrence, in which District Judge Wiseman joined. As I read *Brown*, its holding on the issue of a union's rights is expressed in

Judge Brown's opinion. Judge Brown, writing for himself and for District Judge Wiseman, the majority of the panel, stated that:

> In my view, even though this action was brought pursuant to 42 U.S.C. §§ 1981 and 1983 and not pursuant to Title VII, the district court did not have the authority, when it issued the preliminary injunction to abrogate the contract and statutory rights of the Union to layoffs by seniority. The Union, although it had existing contract and statutory rights to layoffs by seniority, was not a party to this litigation when it was filed and when the consent decree was entered. Therefore, its rights vis-a-vis the City were not affected by the consent decree. Although it intervened at the time plaintiffs moved for the instant preliminary injunction, there was, again, no determination of liability in this proceeding, and the Union's position was that the district court could not and should not authorize layoffs on a basis other than seniority. The district court did not so authorize layoffs. The district court could abrogate the rights of the Union to layoffs by seniority, as required by its contract and the Ohio statute, only in a proceeding in which the Union was a party, and in which there was a determination that: (1) plaintiffs' constitutional rights had been infringed; and (2) it was necessary to vindicate plaintiffs' constitutional rights to hold such contract and statutory rights of the Union to be unenforceable.

644 F.2d at 566.

Applying Judge Brown's reasoning here, I must conclude that the District Court has no authority to abrogate the Union's contractual and statutory rights. The Union was not a party to this suit when the consent decree was entered. Judge McRae simply enjoined the City from making its proposed layoffs in the Fire Department. Judge McRae's actions do not affect the collectively bargained rights of the Union. I therefore dissent from Judge Keith's opinion, to the extent

that it holds otherwise. The law in this Circuit does not sanction modification of a consent decree to alter or destroy the rights of a non-party union concerning layoffs by seniority, unless a hearing is held in which the union is a participating party, and a court determines that: "(1) plaintiffs' *constitutional rights* had been infringed; and (2) it was necessary, *to vindicate plaintiffs' constitutional rights*, to hold such contract and statutory rights of the Union to be unenforceable." *Brown* v. *Neeb*, 644 F.2d at 567 (Brown, J. concurring in result only). (emphasis added).

Furthermore, the consent decree does not concede liability, and it cannot be construed as such an admission. The District Court has never held an evidentiary hearing nor has it determined that the City is liable for past acts of discrimination. To the extent that Judge McRae and Judge Keith assume that liability has, in fact, been established, I must also disagree.

I dissent from those sections of Judge Keith's opinion that purport to discuss the merits of the proposed intervenors' suggestions for alternative relief. As I read the record, Judge McRae never held a hearing on the merits of constructive promotion, monetary damages, or any of the other alternatives advanced by the unsuccessful intervenors in their motion to intervene. In fact, Judge McRae did not discharge his duty to consider fully the interests of incumbent employees before approving the settlement decree. *See Airline Stewards* v. *American Airlines*, 573 F.2d 960 (7th Cir. 1978). The sole purpose of the May 16, 1980 hearing was to determine the validity and timeliness *of the intervention request itself*. The only consideration Judge McRae gave to the merits of the proposals he expressed in these words: "And I would not be a party to any of this constructive promotion bit. That's not much good for anybody. And it is certainly not good – *well, that's no way to run a fire department.*"

Today this Court has upheld the District Court's decision that the intervention motion was untimely. *D. L. Orders,*

et al. v. *Carl W. Stotts, et al.*, No. 80-1469. I have dissented from that conclusion, and I reaffirm my judgment on the intervention issue here. Judge Keith states for the majority that the proposed intervenors' attempt to intervene to challenge the consent decree is "an impermissible *collateral* attack." Judge Keith misapprehends the very purpose of intervention, which is to afford to unrepresented persons who have an interest in litigation a legitimate avenue for asserting and protecting that interest. Intervention confers standing on a party to participate in litigation and thus affords the intervening party the very means by which to *avoid* estoppel. I also disagree with Judge Keith's statement that compensatory relief for incumbents would impose conflicting obligations on the Department. In my view, it would merely make compliance more expensive.

This Court has not been asked to review the merits of a judicial determination on the proposed intervenors' arguments. The proposed intervenors are not formal parties to this litigation, nor to any of the prior proceedings. Because Judge McRae never held a hearing on the merits, no issue has either been raised or preserved for appellate review beyond the timeliness of the motion to intervene itself. Having decided that the motion was untimely, Judge McRae had no jurisdiction to entertain the merits of the proposed intervenors' arguments. Neither does this Court. Nor has this Court been presented with the contention that the decree constitutes "reverse discrimination." I dissent from Judge Keith's sua sponte conclusion that the decree is "constitutional." I am disturbed by Judge Keith's lengthy discussion of the consent decree's validity and reasonableness vis a vis the proposed intervenors. In my view, this discussion is purely advisory, inappropriate in light of the conclusions I reach in my dissent in *D. L. Orders, et al.* v. *Carl W. Stotts, et al.*, No. 80-146, and most importantly, far beyond the scope of our appellate jurisdiction.

I offer one final observation on the majority opinion. The

majority asserts that the proposed intervenors improperly asked the District Court to "restructure" the Memphis Fire Department. Judge Keith states that Judge McRae correctly denied this request, because he lacked such authority under *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). I find the majority's statement and citation ironic, given the fact that this Court today affirms the modification of the consent decree to prevent the City and the Department from following their standard seniority system in conducting layoffs. The irony of the majority's statement is particularly striking, read in light of the majority's conclusion that the Department should not have determined unilaterally to reduce the number of workers. According to the majority, "[a]lternative methods for meeting the crisis were available", and, presumably, should have followed.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff*, v. CITY OF MEMPHIS, a municipal corporation, et al, *Defendants*.	CIVIL ACTION No. C-74-286

CONSENT DECREE

(Filed November 27, 1974)

This action was brought by the Attorney General against the City of Memphis to enforce the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, as amended by the Equal Employment Opportunity Act of 1972 (Pub. L. 92-261, March 24, 1972); the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221, *et seq.*, the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. § 1981. The Complaint sets forth certain allegations of the United States of America that the City of Memphis has engaged in a pattern or practice of discrimination based on race and sex in hiring and promotion within the City divisions, including the Memphis Light, Gas & Water Division. This Consent Decree resolves all issues raised by the Complaint with the City other than the employment practices of the Light, Gas & Water Division and the terms of this Decree

do not apply to that Division. All issues raised by the Complaint regarding employment practices at the Light, Gas & Water Division remain outstanding.

The City of Memphis denies it has heretofore engaged in any pattern or practice of discrimination in hiring or promotion on the basis of race or sex but realizes that certain past practices of the City may have given rise to an inference that such practice may have occurred. The City states that it has made good faith efforts to rectify racial or sexual exclusion in City employment and that since January 1, 1972, it has substantially increased blacks and women in the Police Division and blacks in the Fire Division. The City states that for the purpose of avoiding any further inference of discrimination, it has heretofore taken certain steps to increase the availability of qualified black and female employees by transfer and promotion, training programs, and career ladder programs in City employment.

For the same purpose and with the same intent the City is now willing to agree to the entry of a consent decree providing for additional measures to be taken. Both parties wish to avoid the delay and expense of litigation and desire to insure that any disadvantage to blacks and females that may have resulted from any past discrimination in obtaining employment and advancement is remedied so that equal employment opportunity will be provided to all. The City of Memphis and the United States, by agreeing to the issuance of this order, waive a hearing and finding of facts and conclusion of law on all issues raised by the Complaint with respect to employment by the City except employment at the Light, Gas & Water Division and the parties have mutually agreed to the entry of the consent decree, which shall not constitute an adjudication or admission by the City of any violation of law or findings on the merits of this case.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The Defendant City and its officials, agents and employees and all persons acting in concert with them in the performance of City functions shall not engage in any act or practice which has the purpose or effect of unlawfully discriminating against any employee of, or any applicant or potential applicant for employment with the City of Memphis because of such individual's race or sex, it being understood that remedial actions and practices permitted by this Decree shall not be deemed discriminatory. Specifically, the Defendant City shall not fail or refuse to hire, promote, upgrade, train or assign any individual, discharge any individual or otherwise discriminate against an individual as an employee or applicant for employment with respect to compensation, terms, conditions or privileges of employment because of race or sex.

2. The provisions of this Decree are intended to cover all full-time employment with the City of Memphis, except that the goals and other affirmative relief established herein, including affected class relief, shall not apply to employment in the Memphis Transit Authority, the Memphis-Shelby County Health Department, the Memphis-Shelby County Planning Commission, the Memphis-Shelby County Airport Authority, the Memphis Housing Authority, the Board of Education of the Memphis City Schools, Memphis-Shelby County Public Library and the Memphis-Shelby County Hospital Authority, said organizations either being separate authorities or administered through the County of Shelby; and provided further that the provisions set forth in the succeeding paragraphs do not apply to part time employment unless the provision so states.

3. The purpose of this decree is to insure that blacks and women are not placed at a disadvantage by the hiring, promotion and transfer policies of the City, and that any disadvantage to blacks and women which may have resulted from past discrimination is remedied so that equal employment

opportunities will be provided to all. The City has agreed that in determining whether that purpose has been achieved, an appropriate standard of comparison is the proportion of blacks and women in the Shelby County civilian labor force. The City, therefore, agrees to undertake as its long term goal in this decree, subject to the availability of qualified applicants, the goal of achieving throughout the work force proportions of black and female employees in each job classification, approximating their respective proportions in the civilian labor force. Except as otherwise provided in paragraphs 4, 10, and 15 below, the City shall, in meeting the long term goal for black employees, establish and attempt to meet an interim goal, in classifications where the long term goal has not been met, of filling at least 50% of all vacancies with qualified black applicants. The City in meeting the long term goal for women shall actively encourage female employees in clerical positions to seek transfer or promotion to those positions where the long term goal has not been met, and shall employ affirmative recruitment efforts for female applicants for those positions which are entry level classifications. Except as provided in paragraphs 4, 10, and 15, no specific interim numerical goals shall be established for women for the initial year of this Decree. After February 15, 1976, the parties shall meet with the City to determine appropriate interim goals for women for those job classifications in which the long term goal has not been met. In no event shall the City be required to hire unnecessary personnel, to hire, transfer or promote a person who is not qualified or to hire, transfer or promote a less qualified person in preference to a better qualified person, nor shall the City apply any standard for employment which does not validly measure qualifications for that position. Compliance with interim goals established pursuant to this decree shall be measured on an annual basis except where otherwise specifically provided.

4. The City shall, for those positions such as accountant

and engineer which require a professional degree, establish and attempt to achieve an initial interim goal of filling 30% of the total vacancies in such positions with qualified black and/or female applicants. This level of this interim goal shall be reviewed by the parties after February 15, 1976, on the basis of performance of the City in the period and the availability of qualified black and female applicants in these professional areas.

5. (A) Insofar as the term "affected class" is used in the provisions of this Decree, it shall include:

(1) Incumbent black full-time employees hired prior to January 1, 1972, in the Public Works and Sanitation Division, and in the Park Commission, who are in pay grades 51-52-53-54-55, except for the positions of Zoo Keeper and Auto Inspection I and II, and to include service truck and wrecker operator, and all other black incumbent employees who are employed in positions considered classified which exist below grade 9 in the City's current pay plan.

(2) Female incumbent full-time employees in positions which are by job title or description clerical in nature.

The defendant agrees to furnish to the plaintiff within ninety (90) days after the entry of this decree a list of the members of the affected class by job classification and individual seniority date.

6. (a) The City shall, for all purposes of promotion, transfer and assignment, compute the seniority of a person in the affected class as defined in paragraph 5, as the total seniority of that person with the City.

(b) Except as otherwise provided in paragraphs 10 and 15 for filing vacancies in the Police and Fire Division and in

supervisory positions, the following procedure shall be followed in filling vacancies under this decree:

(1) A member of the affected class shall be given the initial opportunity to fill any vacancy in the City where the person is the senior applicant who meets the minimum qualifications for the position. This preference is exercised at the written election of the applicant. An affected class member using this preference who successfully transfers to and holds a position, as defined in paragraph 8, shall be considered on the same basis as other applicants on subsequent bids, subject to 6(a) above.

(2) Where no affected class member seeks or is entitled to a vacancy as provided in (1) above, the vacancy shall be filled pursuant to the procedures set forth in the City's Civil Service Ordinance and in the City's labor memoranda subject to 6(a) herein and in a manner consistent with meeting the goals set forth in the decree.

7. All members of the affected classes shall be notified of the provisions of this Decree and specifically of the opportunity to transfer and/or promote to other positions when such vacancies occur and are posted for bid by the City Personnel Division. At least ten (10) days before any such vacancies are to be filled, notices of the vacancies shall be posted at each location and in each department where a member of the affected class is employed. Appointed positions listed under Charter Section 248 (d), (e), (f), (g), and (h) are excluded from this posting requirement.

8. If a member of the affected class shall transfer or promote to a new position pursuant to paragraph 6(b)(1), the person shall be given a reasonable opportunity of up to ninety (90) days or up to six (6) months under Civil Service, as appropriate, to determine if he or she wishes to remain in the

position or for the City to determine if he or she is able to perform the job. Should the person wish to relinquish the position, or the City determine that the person is not able to perform the job, the person may return to the previously-held position with the same pay as prior to transfer and without loss of seniority. Whenever such a person is determined by the City not to be qualified or capable of performing in the position, the City shall submit in its periodic reports to the United States a written statement detailing the basis for the person's removal from the position. It is agreed that nothing in this Decree shall require Defendant to keep an employee in any position after the trial period in which the employee cannot perform the assigned tasks as adequately as such tasks have generally been performed in the past or if the employee's work habits or attendance are inferior as compared with other employees doing similar work.

9. No member of the affected class who makes a lateral or downward transfer for the purpose of enhancing promotional opportunities, shall be paid at a lower rate than the rate for the job from which the person transferred, including any regular within grade increments the person would have received had the person remained on that job. A person utilizing rate retention pursuant to this paragraph who returns or is returned to the original job pursuant to paragraph 8, may utilize the right to rate retention on a subsequent transfer, provided, however, that this right to rate retention may not be exercised on more than three occasions. The right to rate retention shall continue until the person has reached that level in the new department or line of progression where the rate of pay is equal to or higher than that in the previously held job classification. A transferee shall lose this privilege of rate retention if the person refuses a promotion in the new line of progression or fails to bid on a higher rate job in the new department for which he or she is eligible.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CARL W. STOTTS,
Plaintiff,
v.
MEMPHIS FIRE DEPARTMENT, et al.,
Defendants.

CIVIL ACTION
No. C-79-2441-M

FRED L. JONES,
Plaintiff,
v.
MEMPHIS FIRE DEPARTMENT, et al.,
Defendants.

CIVIL ACTION
No. C-77-2104

CONSENT DECREE

The plaintiffs Carl W. Stotts and Fred L. Jones filed their complaints in this action on February 16, 1977 and June 19, 1979 against the Memphis Fire Department and other City of Memphis officials, alleging that the defendants are engaged in a pattern or practice of discrimination in hiring and promotions on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended by the Equal Employment Opportunity Act of 1972 (Pub. L. 92-261, March 24, 1972); 42 U.S.C. § 1981 and 42 U.S.C. § 1983.

The parties wish to avoid the delay and expense of contested litigation and desire to insure that any disadvantage to minorities that may have resulted from past hiring and pro-

motional practices be remedied so that equal employment opportunity will be provided to all.

The Court has jurisdiction over the parties and subject matter of this action.

The parties, by agreeing to the issuance of this order, waive a hearing and findings of fact and conclusions of law on all issues raised by the complaints, and the parties have mutually agreed to the entry of this Consent Decree. Defendants, by entering into this Consent Decree, do not thereby admit any violations of law, rule, or regulation with respect to the allegations made by plaintiffs in their complaints.

The Court having been fully advised and informed of the facts and circumstances, and good cause appearing therefore,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

I.

EFFECT OF THE CONSENT DECREE

This Decree is entered into as a settlement of an existing dispute between plaintiffs and defendants as to appropriate and valid procedures for the hiring and promotion of Fire Department personnel for the City of Memphis. It also provides for specific, definable and good faith efforts to be made by defendants to achieve certain goals for employment of blacks. This Consent Decree satisfies and resolves all claims of plaintiffs and the class they represent of racial discrimination with respect to those matters set forth in the complaints and the previous orders of this Court.

This Decree is not intended to conflict with any provisions of the Consent Decree entered into on November 24, 1974 between the United States of America and the City of Memphis in Civil Action No. 74-286; rather this Decree is intended to parallel and supplement the relief provided in that Consent Decree.

Both plaintiffs and the class they represent shall seek no further relief for the acts, practices or omissions alleged in the complaints save to enforce the provisions of this Decree, thereby waiving the right to seek further relief.

Plaintiffs agree that this Consent Decree is fully binding individually and on the class they represent. Defendants agree that this Consent Decree is fully binding on each of them, each of their officers, agents, employees and successors, and all other persons acting in concert with them who have notice of this Decree.

II.

CLASS CERTIFICATION

Plaintiff Stotts brought this action as a class action, and in its order of May 4, 1978, the Court certified the plaintiff class. For purposes of this Decree, the Court hereby adopts the class description set forth in that order with modifications as follows:

> The class in this case consists of all incumbent black employees of the Memphis Fire Department, all those black employees who will be employed there in the future, and all black persons who have been denied employment with the Memphis Fire Department since March 24, 1972.

This action was brought, insofar as is relevant to this section of the Decree, on the basis of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended, and 42 U.S.C. §§ 1981 and 1983. For purposes of this settlement alone, and for no other purposes, the Court is satisfied that the above class should be and hereby is certified as proper under Federal Rule of Civil Procedure 23(b)(2) for injunctive, declaratory and back pay relief, and under Federal Rule of Civil Procedure 23(b)(3) for purposes of recovery of compensatory or punitive damages, if any.

III.

GENERAL

1. Defendants are compelled by law and by entering into this Consent Decree acknowledge their obligation to, and agree that they shall, refrain from engaging in any act or practice which has the purpose or effect of unlawfully discriminating against any employee of, or any applicant or potential applicant for employment with, the Memphis Fire Department because of such individual's race or color. Defendants in addition acknowledge their duty under law to and agree that they shall, refrain from discrimination at any time on the basis of race in hiring, promotion, upgrading, training, assignment or discharge or otherwise discriminating against an individual employee or applicant for employment with respect to compensation, terms and conditions or privileges of employment because of such individual's race. The City shall take reasonable steps to assure that no member of the Fire Department interferes with the enforcement of this decree by any means. The acknowledgments set forth in this paragraph do not create a right or rights in any person or groups of persons to seek relief under this Decree for defendants' failure to comply with their general legal obligations as described in this paragraph, except for conduct which constitutes a pattern or practice of unlawful discrimination on the basis of race.

2. In the event the entry of this Consent Decree generates, either through intervention or separate, collateral lawsuits, attacks on the appropriateness or sufficiency of any of the provisions contained herein, to include actions claiming entitlement to damages against the City as a result of the ordering of any of the affirmative relief contained in this Decree, the parties hereto agree and warrant that they shall defend the lawfulness of any provision or provisions so attacked. If any such collateral lawsuit arises in state court against the

City, it shall seek to remove such action to the Federal District Court.

IV.

SELECTION PROCEDURES

3. The City shall continue to develop and reassess its present affirmative recruitment program to inform minorities of job opportunities with the Memphis Fire Department. In filling vacancies in the entry level position, the City shall continue to emphasize recruitment from among qualified members of the affected class, as provided in the Consent Decree in CA-74-286.

4. The City may maintain their current or similar education standards and selection procedure for firefighters, provided, however, that these standards and procedures do not have an adverse impact on members of the affected class as measured by compliance with the interim hiring goal set out in paragraph 7 below. If such impact is shown, the City must demonstrate the job relatedness of the particular education standard or selection procedure.

5. The City may continue to use on a pass-fail basis (or other grading system authorized by the U.S. Department of Justice provided that no adverse racial impact is present) written promotional examinations for the Fire Department. However, the City shall evaluate these examinations and promotional testing procedures to insure that the use of these examinations will not have an adverse impact on black applicants. The parties agree that adverse impact will be shown if the adverse differential in the failure rate for blacks is in excess of five (5) percent. The City shall maintain records of the results of all such examinations sufficient to determine the impact on black applicants and shall provide this informaiton to plaintiffs' attorney at the same time as the information is submitted to the United States Department of Justice in accordance with the Consent Decree in CA-74-286.

The City also agrees that it will administer promotional examinations on a regular basis, but in any event, at least every two years. The City shall notify plaintiffs' counsel of plans to administer promotional examinations as soon as practicable after the decision has been made on such plans.

V.

GOALS

6. The purpose of this decree is to remedy the past hiring and promotion practices of the Memphis Fire Department with respect to the employment of blacks and continuing the efforts made in the City in hiring and promotions under the consent decree entered in CA-74-286. In achieving that purpose, it is the intent of the parties to work within the arrangements established between the Department of Justice and the City of Memphis in that consent decree. In that regard the parties agree that the long term goal established in this decree shall be that set forth in CA-74-286, *viz.* that the goal shall be to raise the black representation in each job classification on the fire department to levels approximating the black proportion of the civilian labor force in Shelby County. Goals established herein are to be interpreted as objectives which require reasonable, good faith efforts on the part of the City, and not as rigid quotas.

7. *Hiring*: The City shall, in meeting the long term goal for black employees, establish and attempt to meet an interim goal, in entry level classifications where the long term goal has not been met, of filling on an annual basis at least 50% of all vacancies with qualified black applicants. Based on the experience with prior academy classes, the parties expect that the interim hiring goal above will be met both at time of initial appointment and successful completion of academy training. If any classes of firefighters hired pursuant to this order experiences a disproportionate rate of attrition among

black firefighters, the parties shall meet promptly to determine the reason therefor, and to discuss methods or remedying the unbalance so that achievement of the long-term goal can be facilitated.

8. *Promotion*: To insure as quickly as practicable the attainment of its long range goal, the City agrees to the following interim goals, subject to the availability of qualified applicants:

(a) The City adopts the goal of promoting Black applicants to positions above the rank of private or other entry level job classification in proportion to their representation in the qualified applicant pool for each uniformed rank or civil service classification. The parties agree to a goal of promoting blacks in the proportion of at least 20% for each civil service classification or uniformed-rank as measured on an annual basis; the parties recognize that the number of blacks qualified for a particular job rank or classification may be a relevant factor in measuring the City's compliance with these goals. Nothing in this paragraph or Decree should be construed in such a way to require the promotion of the unqualified or the promotion of the less-qualified over the more qualified as determined by standards shown to be valid and nondiscriminatory as set forth in the Uniform Guidelines on Employee Selection Procedure, 28 C.F.R. 50.14.

(b) During periods when acting positions are available, these non-permanent assignments from the next lower rank in the uniformed force shall be based on experience and demonstrated ability, for the position to which the employee shall be assigned and, consistent with the foregoing, reasonable efforts shall continue to be made to give leadership experience to eligible blacks.

VI.

SPECIFIC RELIEF

9. *Promotions*: The promotions lisited in Exhibit A to this Decree shall become effective upon the entry of this decree. The conditional promotions shall become effective upon fulfillment of each condition listed in Exhibit A.

10. *Monetary Relief*: The parties to this Decree have agreed that the aggregate monetary relief in this case shall be $60,000 of which all shall be considered back pay. This money shall be awarded pursuant to the amounts listed in Exhibit B with the City to prepare individual checks within 15 days (or as soon as practical utilizing good faith efforts) of the final entry of this decree and delivered to plaintiffs' counsel for distribution. All persons who receive monetary relief herein shall execute a release in the form attached as Exhibit C as a condition of payment.

VII.

REPORTING

11. The City shall maintain and retain during the period of this decree necessary records to support the implementation of this decree which shall be the same records kept for implementation of the Consent Decree in CA-74-286. These records shall be made available to the plaintiffs' counsel for inspection and copying upon written request and where applicable subject to an appropriate protective order.

To avoid conflicts with the Attorney General's continuing monitoring and compliance efforts pursuant to the Consent Decree in CA-74-286, the parties agree to the following provisions:

(a) The City will furnish to Plaintiffs' counsel copies of all reports relating to the Fire Division made to the Attorney General pursuant to the Consent Decree in CA-74-286.

(b) Should any dispute or controversy arise concerning the Defendants' application of, or adherence to, the provisions of this decree, Defendants' and Plaintiffs' counsel shall confer with the Attorney General and seek a mutually agreeable resolution of the disputes.

(c) Should voluntary efforts to resolve the dispute or controversy fail, Plaintiffs' counsel may then petition the Court for redress or resolution.

12. The City will maintain the following records:

(a) All applications and related records for all persons seeking employment or promotions with the Memphis Fire Department and shall include on such applications identification of the applicant by race. The records retained shall include, where applicable, copies of tests administered and the test results.

(b) All written communications between the City and applicants for both initial entrance, transfer and promotion.

13. At the times established for such reports to the Attorney General in CA-74-286, the City shall report to plaintiffs' counsel the following information:

(a) A summary showing the total number of employees by race in each job classification of the Memphis Fire Department.

(b) A list of all newly hired employees indicating the name, race, and job classification of each since the last report was filed.

(c) A list of all persons, by job classification, to whom promotion has been offered and whether or not that promotion has been accepted.

(d) A breakdown of the applicant flow of the Memphis Fire Department by race which indicates the number of applicants by race, rejected and pending for each job classi-

fication. A person is considered an applicant for this purpose upon filing a formal application when a job is posted and upon meeting the minimum qualifications for the position.

(e) A list of all promotions, name, race, and date of hire of the employee promoted and the date of the promotion.

14. The City shall provide counsel for the plaintiffs a copy of each of the following documents relating to the Fire Division at the times established for reporting to the Attorney General pursuant to the Consent Decree in CA-74-286:

(a) each eligibility list for hiring or promotion to any rank in the department identifying each individual on said list by name and race;

(b) each new or revised job description or classification;

(c) notice of the filling of vacancy in any uniformed or non-uniformed position within the Fire Department including the name and race of the person selected.

VIII.

MISCELLANEOUS

15. *Attorneys' Fees and Costs.* The City shall pay counsel for plaintiffs, attorneys' fees and costs in the amount of $..... in settlement of all claims by said counsel for attorneys' fees from the commencement of this action to the entry of this Decree and such amount shall be paid within 15 days of the final entry of this Decree. (The parties have followed the recommendation of *Prandini* v. *National Tea Co.*, 557 F.2d 1015, (3d Cir. 1977) and will begin to negotiate the possible settlement of fees and costs after the Court's preliminary approval of this Consent Decree.)

16. If any provision of this Decree causes a result unintended by all the parties or an ambiguous interpretation, the aggrieved party shall notify the other parties and the Attorney

General by mail of the unintended result or ambiguous interpretation. The parties shall have 30 days after the date of such letter to resolve the problem. If the parties are unable to reach agreement within such 30 days, the issue may be submitted to the Court for resolution.

17. The Court retains jurisdiction of this action for such further orders as may be necessary or appropriate to effectuate the purposes of this decree.

18. *Notice.* The Court hereby gives its tentative approval to this Consent Decree, subject to the notification of class members and the provision of an opportunity for them to file objections. The text of the notice to be is set forth in Exhibit D. This notice shall be posted at each firehouse or other Bureau facility of the Fire Department for a period of 15 days beginning April 28, 1980, and mailed to each identified class member listed in Exhibit B on that date. Class members who file written objections within this period shall be entitled to be heard on their objections at a hearing before this Court on May 16, 1980. If no written objections are filed within the 15 day period, this Consent Decree shall become final without further action by the Court.

ENTERED, this 25th day of April, 1980.

/s/ ROBERT M. McRAE, JR.
UNITED STATES DISTRICT JUDGE

APPROVED:

/s/ RICHARD B. FIELDS
RICHARD B. FIELDS
RATNER & SUGARMON
ATTORNEYS FOR PLAINTIFFS

/s/ CLIFFORD D. PIERCE, JR.
CLIFFORD D. PIERCE, JR.
EDWARD R. YOUNG
J. DANIEL MORGAN
ATTORNEYS FOR DEFENDANTS

MEMPHIS FIRE DEPARTMENT
FIRE FIGRTING CLASS

(Data derived from inspection of class pictures at the Memphis Fire Department Training Center)

DATE	BLACK	WHITE
10-25-50	0	12
1-2-51	0	36
2-20-51	0	15
6-17-51	0	16
12-5-51	0	10
2-4-52	0	17
4-15-52	0	13
9-24-52	0	20
1-5-53	0	14
3-23-53	0	12
6-15-53	0	12
10-26-53	0	16
2-5-54	0	23
6-14-54	0	14
1-3-55	0	21
7-11-55	16	12
7-18-55	0	10
1-3-56	0	28
4-9-56	0	28
10-29-56	0	34
3-11-57	0	40
10-27-58	0	30
5-11-59	0	24
11-30-59	0	30
5-9-60	0	18
7-18-60	0	17
10-17-60	0	19
3-6-61	0	46

DATE	BLACK	WHITE
11-20-61	0	37
2-15-62	0	43
7-9-62	0	30
12-17-62	0	30
10-7-63	0	28
10-5-64	1	32
1-18-65	0	50
12-13-65	3	40
3-7-66	1	55
7-18-66	0	33
7-3-67	1	50
7-16-68	4	38
10-1-68	3	69
3-17-69	1	71
5-1-69	5	66
8-25-69	5	88
11-3-69	5	102
6-28-71	2	18
6-5-72	11	40
9-5-72	7	38
10-30-72	8	42
1-2-73	11	28
9-24-73	5	46
9-30-74	3	25
9-26-77	43	30

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE
WESTERN DIVISION

NO. 77-2014

CARL W. STOTTS,
Plaintiff,

-vs-

MEMPHIS FIRE DEPARTMENT, ET AL.,
Defendant.

NO. 79-2441

FRED L. JONES,
Plaintiff,

-vs-

MEMPHIS FIRE DEPARTMENT, ET AL.

ORAL RULING OF COURT - MAY 8, 1981

THE COURT: All right.

I'm going to announce my findings orally at this time and ask that proposed findings be drafted and available for me when I return to the City a week from tomorrow.

I will be at a judicial conference, as will all of the Judges in the 6th Circuit.

It would probably be better if we had more time to pursue this procedurally. However, I think counsel has done a good job of getting ready for a hearing on short notice and advising the Court of the relative positions, and taking the best approach.

It is apparent, and the Court finds, that the Consent Decree that was entered in these cases—and I have reference to Stotts and Jones versus the Memphis Fire Department, which Decree was entered on April 25, 1980—did not contemplate what method would be used for a reduction in rank or layoff, because the City had never laid anybody off until recently in 1981, and still hasn't, in the Fire Department. This was an agreement, that like many agreements, that did not contemplate that circumstance.

Similarly, the Court finds that there was no specific provision pertaining to layoffs in the Consent Decree for the City wide case, which I believe was in Judge Welford's Court, and that was in the early 70's.

Therefore, this Court must consider whether or not, under the facts and circumstances, it should exercise its authority to modify a Consent Decree by directing the City officials not to use the method which they have proposed.

I do find that the adoption of this layoff policy was not adopted with the intent or specific purpose to discriminate against black, and I find no reason—well, neither the layoffs nor the policy adopted was intended to be discriminatory. However, I find it inescapable that the effect is discriminatory.

While the agreement does not admit discrimination, it would be naive not to realize that the Fire Department of this City was very discriminatory towards black people for years, and it really wasn't corrected properly until the Consent Decree was entered in this cause.

It is true that this Court never had hearings and made findings, but I could take judicial notice of that from the figures that are in the record in this Court.

The purpose of these lawsuits was hiring and promotion.

Now, the proposed layoff policy is based on city wide seniority. Although we have no specific figures, I find that there would be little seniority based upon members of the Fire Department working in other departments of the City. There may be some. The Director indicated that there would, but not much.

The system would, of course, recognize seniority on the date of hire in the Fire Department, and anybody who had been promoted would have the benefit of that being his seniority date for purposes of bumping or demoting.

Of course, there is a contract—or I shouldn't say a contract because we have gone through that charade. The City does not recognize contracts with its employees —labor contracts—so we call them memorandum of agreement, or something. Well, there is whatever that is, and it may have some bearing on this. If it is not a contract, maybe it is not entitled to all of the sanctity of a contract.

But in any event, they have introduced two memorandum of understanding that were negotiated for and arrived at, which does have the city wide seniority position for layoffs.

However, because the effect of that, and the proposed system is in effect discriminatory, I find that such a position is not a bona fide seniority system.

While there is no proof that the City has been defiant about its activities in this case—now, I am not too familiar with the '74 case, but I know through the years from the time that was entered until now, we still had a lot of dispute even though the City had agreed to do right. We still get lawsuits against the City, I believe every month. But be that as it may, I really find it kind of—although

they have not been defiant, and there is no suggestion that they have been contemptuous, I find it a little awkward for the City to be boastful and proud of a record of eleven percent. I hope that is not the end of the line.

And to come in and say, "Yes, we have done fine." Well, it is going to be harder. And I agree that these people who have obtained these ranks, they were hard to come by. And there is still not anything to be proud of.

The figures show that in the lieutenant category, there are two hundred and forty of them, two hundred and eleven are white, twenty-nine are black.

In the driver category, three hundred and eleven of them, fifteen are black, two hundred and ninety-six are white.

Now, that may not reflect defiance, but it is not anything to brag about either. And I do find that this layoff policy would set that back. And I cannot—this is a preliminary injunction hearing, and it may be that time will give some assistance to whether or not the bumping up process will be effective. Frankly, I think it is speculative for the Court to make any finding on that. I am not saying that it won't happen.

And I realize that the layoff policy is hard to get a handle on, and that Mr. Sabbatini is correct when this thing changes day-to-day. And you are talking about fifty-five people leaving from these bureaus, it might not be fifty-five, it might be fifty-four or fifty-three. Well, that is not a significant change, but it would be the fifty-fifth person or fifty-fourth, as the case may be.

Therefore, I direct that the City not apply the city wide seniority policy, insofar as it will decrease the percentage of lieutenants, drivers, and inspectors, and privates, that are presently employed.

Now, that may require two seniority lists, but frankly, I don't think that is so bad when you realize that the present situation resulted from prior discrimination, which is obvious.

Now, I am sure that this is going to create problems for City personnel who already have many problems, and I'm sorry for that. But at the same time, the Court believes that the City should file a proposed plan for not violating the Court's injunction.

Now, I still maintain that I do not have the authority to order that no members of the Union be laid off. I don't know what the policy will be with regard to that memorandum of understanding that the City signed with the Fire Fighters Union.

In summary, I want the attorneys for the Plaintiff to prepare, within the next week, proposed findings along the lines I have just announced, and then a proposed form of injunction which the Court will consider and sign. However, I consider that the injunction is effective with the Court's announcement today orally. Regrettably, I am going to be out of the city and cannot stop to do this.

Now, the injunction should direct the City to propose another layoff policy or an amendment to their current policy.

Now, are there any questions?

MR. FIELDS: Yes, Your Honor.

I think you said the number of persons.

By persons do you mean the percentage of blacks?

THE COURT: Right.

. . .

(Filed May 18, 1981)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE
WESTERN DIVISION

CIVIL ACTION NO. C-77-2104
CARL W. STOTTS,
PLAINTIFF,

VS.

MEMPHIS FIRE DEPARTMENT, ET AL.,
DEFENDANTS.

CIVIL ACTION NO. C-79-2441-M

FRED L. JONES,
PLAINTIFF,

VS.

MEMPHIS FIRE DEPARTMENT, ET AL.,
DEFENDANTS.

ORDER GRANTING PRELIMINARY INJUNCTION

This cause came on to be heard on May 8, 1981 upon the plaintiff's application for a preliminary injunction to enjoin the Memphis Fire Department from laying off or reducing in rank employees on the basis of seniority. The Court finds that the Consent Decree previously entered in these cases did not contemplate the method to be used

for reduction in rank or lay-off since the City of Memphis had never laid off anyone at the time those orders were entered. The Court further finds that the proposed lay-offs and/or reductions in rank proposed by the City of Memphis and the Memphis Fire Department was not adopted with the purpose or intent to discriminate on the basis of race but the effect of these lay-offs and reductions in rank is discriminatory.

While the Consent Decree entered in this matter does not admit racial discrimination on the part of the City, it would be naive of this Court not to believe that the Fire Department did not discriminate for a number of years in the past. Although this Court has made no findings of discrimination by the Fire Department, the Court can take judicial notice of past racial discrimination in the Fire Department based upon the statistical evidence presented in these cases.

Although the seniority system proposed by the defendants is based upon city-wide seniority, the Court finds that few Fire Department employees would have seniority based upon working in other parts of the City. The Court further finds that the two memoranda of understanding between the City of Memphis and Firefighters Local Union No. 1784 do have seniority provisions relating to lay-off. The legal effect of these memoranda is uncertain. In any event, this lay-off and reduction in rank proposal according to seniority is not a bona fide seniority system because its effect is discriminatory.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the defendants not apply the seniority policy proposed insofar as it will decrease the percentage of black lieutenants, drivers, inspectors and privates that are presently employed in the Memphis Fire Department.

The defendants should file a proposed plan to comply with this Court's injunction.

ENTERED this 18th day of May, 1981.

/s/ Robert M. McRae, Jr.
Robert M. McRae, Chief Judge

APPROVED FOR ENTRY:

/s/ Richard B. Fields
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ARTICLE XIX

SENIORITY PREFERENCE

The City shall maintain a city-wide seniority list by rank, showing the name and date of employment. The list shall be alphabetically by seniority and a list provided to the Union.

Seniority lists by work groups shall be provided for the bargaining unit.

In Rank Transfers Senior employees who request transfers in rank will be transferred when an opening is identified by the Fire Division except as provided elsewhere in this clause. Employees transferred will be evaluated during the first thirty (30) days to assure their ability to perform in the new location or on new equipment, and if unable to perform, will be transferred to an appropriate opening. Transfer preferences by seniority shall be limited to the initial opening and shall be filled from requests on file in Fire Headquarters. Subsequent openings, or openings where no preference card is on file, will be filled in accordance with current practice.

This Article shall apply only to moves from one station to another, within the same rank and on the same shift, in the Fire Fighting Bureau.

The preference card shall require the employee to indicate the specific station(s) to which he wishes to be transferred. It is agreed that employees may exercise a transfer preference only one time in a twelve (12) month period and that failure to accept a requested transfer shall be considered an acceptance under this provision. Nothing in this Article shall prohibit one for one swaps from one station to another.

It is also agreed that employees who cannot be moved in accordance with seniority due to performance deficiencies shall be rejected only after such reasons are communicated to the individual by the District Chief and are reduced to writing, including the type of correction needed and the time in which it is expected. When such deficiencies are corrected, the employee shall then be considered for transfer in accordance with seniority preference.

Prior to filling vacancies with recruits, openings will be posted thirty (30) days in advance and transfer requests honored as specified above prior to the remaining openings being filled with recruits, provided however, that this policy shall not result in more than one recruit being placed on any single company.

Temporary assignments shall be for a specific duration and shall be so identified. The employee will be transferred back to his previous assignment upon completion of the assignment.

Lay Off - In the event it becomes necessary to reduce the Fire Division, seniority alphabetically shall govern lay-offs and recalls. Employees lowest in seniority shall be laid off first and shall be the last to be recalled. Members laid off shall be given thirty (30) days notice prior to the effective date of lay-off.

42 U.S.C. §2000e-2h, Section 703(h): Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)). [July 2, 1964, P. L. 88-352, Title VII, 78 Stat. 255, 42 U.S.C. §2000e-2(h).]

FILED
JUL 20 1983
ALEXANDER L. STEVAS,

Nos. 82-206 and 82-229

In the Supreme Court of the United States

October Term, 1982

FIREFIGHTERS LOCAL UNION NO. 1784,
Petitioner,

vs.

CARL W. STOTTS, et al.,
Respondents,

and

MEMPHIS FIRE DEPARTMENT, et al.,
Petitioners,

vs.

CARL W. STOTTS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE
WESTERN DIVISION

No. 77-2104

CARL W. STOTTS, Individually, And On Behalf Of All Others Similarly Situated,
Plaintiffs,

vs.

MEMPHIS FIRE DEPARTMENT; ROBERT W. WALKER, Director of Fire Services; THE CITY OF MEMPHIS; JOSEPH SABATINI, Director of Personnel For the City Of Memphis,
Defendants,

and

FIREFIGHTERS LOCAL UNION NO. 1784,
Intervenor-Defendant.

DOCKET SHEET

DATE	NR.	PROCEEDINGS
2/16/77	1	Complaint
3/ 1/77	2	Answer of Defts.
10/ 1/79	68	DEFENDANTS MOTIONS FOR SUMMARY JUDGMENT & CLASS DECERTIFICATION & MEMORANDUM OF FACTS & LAW IN SUPPORT OF SAID MOTIONS
10/31/79	85	PLF'S RESPONSE TO DEFTS' MOTION FOR SUMMARY JUDGMENT AND CLASS DECERTIFICATION
12/13/79	89	ORDER DENYING DEFENDANTS' MOTIONS - all of defendants' motions are denied - CHJ, FIELDS, PIERCE & YOUNG

4/25/80	90	CONSENT DECREE - by agreeing to the issuance of this order, the parties, waive a hearing & findings of fact & conclusions of law on all issues raised by complaints & have mutually agreed to the entry of this Consent Decree - the purpose of this decree is to remedy the past hiring & promotion practices of the Memphis Fire Department with respect to employment of blacks & continuing the efforts made in the City in hiring & promotions under the consent decree entered in 74-286 - city shall pay attorneys' fees & costs - Court retains jurisdiction of this action - Class members may file objections - notices will be posted at each firehouse for a period of 15 days beginning April 28, 1980 & mailed to each identified class member listed in Exhibit B on that date - members who file written objections w/in this period shall be entitled to be heard on their objections at a hearing before this Court on 5/16/80 - if no written objections are filed w/in 15 day period, this Consent Decree shall become final without further action by the Court - CHJ, OB, FIELDS, PIERCE & YOUNG - *ALL OBJECTIONS TO THIS SETTLEMENT AGREEMENT MUST BE FILED IN WRITING WITH CLERK BY CLOSE OF BUSINESS MAY 12, 1980. OBJECTIONS AFTER THAT DATE WILL NOT BE CONSIDERED*

5/ 4/81	122	VERIFIED APPLICATION FOR TEMPORARY RESTRAINING ORDER & ORDER FOR DEFENDANTS TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE WITH SUPPORTING MEMORANDUM
5/ 4/81	123	TEMPORARY RESTRAINING ORDER - deft are hereby restrained from laying off or reducing in rank any black employees in the Memphis Fire Dept. - application for a preliminary injunction will be heard at 2:00 pm on the 8th day of May, 1981, Courtroom No. 2 - CHJ, FIELDS, PIERCE & YOUNG
5/ 5/81	124	ANSWER OF FIREFIGHTERS LOCAL UNION NO. 1784 TO PLAINTIFFS' APPLICATION FOR INJUNCTIVE RELIEF
5/ 7/81	125	CONSENT ORDER ALLOWING INTERVENTION OF FIREFIGHTERS LOCAL UNION NO. 1784
5/ 7/81	126	PLAINTIFF'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF A PRELIMINARY INJUNCTION
5/ 8/81	127	ANSWER OF DEFENDANTS TO PLAINTIFFS' APPLICATION FOR INJUNCTIVE RELIEF
5/ 8/81	128	DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION

5/ 8/81	129	DEPOSITION OF MAYOR WYETH CHANDLER - 1 vol. - (case nos. 77-2104 & 79-2441) placed in 77-2104 file.
5/ 8/81	130	DEPOSITION OF MR. JOSEPH D. SABBATINI - 1 vol. - (case nos. 77-2104 & 79-2441) placed in 77-2104 file.
5/18/81	131	APPLICATION FOR STAY PENDING APPEAL ON BEHALF OF DEFENDANTS (City of Memphis)
5/18/81	132	MEMORANDUM IN SUPPORT OF DEFENDANTS' APPLICATION FOR STAY PENDING APPEAL
5/18/81	133	MOTION OF INTERVENOR FIREFIGHTERS LOCAL UNION NO. 1784 TO STAY INJUNCTION PENDING APPEAL
5/18/81	134	MEMORANDUM IN SUPPORT OF MOTION OF INTERVENOR-APPELLANT FIREFIGHTERS LOCAL UNION NO. 1784 TO STAY INJUNCTION PENDING APPEAL
5/18/81	135	ORDER GRANTING PRELIMINARY INJUNCTION - defts should file a proposed plan to comply with this Court's injunction - CHJ, FIELDS, PIERCE/ LEWIS & BLAIR
5/18/81	136	ORDER DENYING APPLICATION FOR STAY PENDING APPEAL - deft's & intervenor's application for stay DENIED - CHJ, FIELDS, PIERCE/LEWIS & BLAIR

5/18/81	137	NOTICE OF APPEAL (City of Memphis-Defendants-Appellants)
5/18/81	138	NOTICE OF APPEAL (Firefighters Local Union No. 1784-defendants-intervenor-appellants
5/19/81	139	REPORTER'S TRANSCRIPT - Preliminary Injunction Hearing Friday, May 8, 1981 - 1 vol.
5/19/81	140	REPORTER'S TRANSCRIPT - Oral Ruling of Court Friday, May 8, 1981 - 1 vol.
6/22/81	141	MOTION FOR ADDITIONAL RELIEF PURSUANT TO THE MAY 8, 1981 PRELIMINARY INJUNCTION WITH SUPPORTING MEMORANDUM
6/23/81	142	ORDER - deft's enjoined from applying seniority policy insofar as it will decrease the percentage of blacks in positions of Fire Alarm Operator I, Fire Prevention Supervisor & Clerk Typist - defts shall file proposed plan to comply with Court's 5/8/81 Injunction no later than 6/25 & hand deliver plan to pltf's counsel - If pltfs' object to plan then hearing will be held 6/26 at 2:00 pm to hear objection & rule whether plan complies with Court's Injunction - CHJ, FIELDS, BLAIR, PIERCE & BRITT
6/26/81	143	ORDER EXPANDING PRELIMINARY INJUNCTION - Court finds that deft's proposed plan for conducting layoffs is in accordance with preliminary injunc-

		tion of 5/8/81 & is approved - Fire Dept personnel to be laid off or reduced in rank pursuant to deft's proposed plan have been notified & additional notice is not required - defts are enjoined from applying the seniority policy proposed in conducting layoffs or reductions in rank insofar as doing so will decrease the percentage of blacks in position of Operator I, Fire Prevention Supervisor & Clerk Typist - CHJ, FIELDS, PIERCE/BRITT & BLAIR
8/25/81	144	REPORTER'S TRANSCRIPT "Hearing On Plaintiff's Motion For Additional Injunctive Relief" - 1 vol. (orig. only) - to be mailed as supplement to record now on appeal

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE
WESTERN DIVISION

No. C-79-2441

Comp to C-77-2104

FRED L. JONES,
Plaintiff,

vs.

MEMPHIS FIRE DEPARTMENT; ROBERT W. WALKER, Director of Fire Services; THE CITY OF MEMPHIS; JOSEPH SABATINI, Director of Personnel for the City of Memphis,
Defendants,

and

FIREFIGHTERS LOCAL UNION NO. 1784,
Intervenor-Defendant.

DOCKET SHEET

DATE	NR.	PROCEEDINGS
6/19/79	2	COMPLAINT.
7/31/79	8	ANSWER OF DEFENDANTS

(Filed February 16, 1977)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE
WESTERN DIVISION

No. 77-2104

CARL W. STOTTS, Individually, And On Behalf Of All Others Similarly Situated,
Plaintiffs,

vs.

MEMPHIS FIRE DEPARTMENT; ROBERT W. WALKER, Director of Fire Services; THE CITY OF MEMPHIS; JOSEPH SABATINI, Director of Personnel For the City Of Memphis,
Defendants.

COMPLAINT

1. This is a class action brought pursuant to §706 (f)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(f)(1), and pursuant to 42 U.S.C. §1981, and 42 U.S.C. §1983, to redress discrimination on grounds of race in terms and conditions of employment on behalf of the named plaintiffs and all others similarly situated. The action asserts claims of violations of rights secured by §703 of Title VII, 42 U.S.C. §2000e-2, and by 42 U.S.C. §1981, and by 42 U.S.C. §1983, and seeks a declaratory judgment, pursuant to 28 U.S.C. §§2201, 2202, and preliminary and permanent injunctions. This Court has jurisdiction pursuant to §706(f)(3)(4) of Title VII,

42 U.S.C. §2000e-5(f)(3), and pursuant to 28 U.S.C. §1343 (3)(4).

2. Plaintiff, Carl W. Stotts, is a black citizen and is a resident citizen of Memphis, Shelby County, Tennessee.

3. The Memphis Fire Department at all times mentioned herein was and is the department of government of the City of Memphis, charged with fire protection responsibilities of the City of Memphis.

4. Robert W. Walker is employed by the defendant Memphis Fire Department as its Director of Fire Services. In this capacity, he is the chief executive officer of the defendant Memphis Fire Department.

5. The City of Memphis is a municipal corporation organized and existing under the laws of the State of Tennessee. The city, pursuant to law, operates the Memphis Fire Department.

6. Defendant Joseph Sabatini is Director of Personnel for the City of Memphis, and in said capacity, also formulates policies governing employees of the City of Memphis, and of said defendant Memphis Fire Department.

7. The plaintiff brings this action on his own behalf and on behalf of all others similarly situated pursuant to Rule 23(a)(b)(2) of the Federal Rules of Civil Procedure. The class which the plaintiff represents is composed of all black persons who are employed, who might be employed, and who have applied for employment with the defendant, and who should have been promoted by the defendant, but for the policies and practices of discrimination on the basis of race alleged herein, and those persons who have been, and continue to be or might be adversely affected by the policies and practices complained

of herein. There are common questions of law and fact affecting the rights of this class who are, and continue to be limited and discriminated against in ways which deprive and tend to deprive them of equal employment opportunities and otherwise adversely affect their status as employees or applicants for employment because of their race. These persons are so numerous that joinder of all parties is impracticable. A common relief is sought. The interests of said class are adequately represented by the plaintiff. The defendants have acted or refused to act on grounds generally applicable to the class.

8. Plaintiff would show that he was hired by the City of Memphis as a candidate for the Memphis Fire Department on July 11, 1955. He presently holds the position of Fire Fighting Captain.

9. Plaintiff avers that he has been denied promotions to ranks for which he is qualified solely because of his race. Plaintiff avers that white members of the Memphis Fire Department have been promoted to higher positions within the Fire Department even though they are less qualified than plaintiff. Because of policies and practices of defendant that were and are of a continuing nature, plaintiff has been denied his rightful rank in the Memphis Fire Department.

10. Plaintiff avers that the policies and practices of the defendant which resulted in his non-promotion are the same policies and practices which are used against members of the class which the plaintiff represents to keep black persons from being hired and promoted at the Memphis Fire Department.

11. Plaintiff would show that he filed a Complaint with the District Office of the Equal Employment Opportunity Commission in Memphis, Tennessee on or about

August 22, 1975. On January 4, 1976, plaintiff received a "Notice of Right To Sue" authorizing him to institute a civil action in the appropriate Federal District Court within ninety (90) days of receipt of said letter. This complaint is timely filed pursuant to said notice.

WHEREFORE, for the reasons stated, plaintiff prays that this Court:

1. Advance this case on the docket, order a speedy hearing at the earliest practical date, and cause this case to be in every way expedited.

2. Issue a declaratory judgment that defendants' acts, policies, practices, and procedures complained of herein violated the rights of plaintiff and the class he represents as secured under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000(2), *et seq.*, (Supp. 1972) and the Fourteenth Amendment to the United States Constitution.

3. Enter an injunction prohibiting the defendant, their agents, successors, employees, attorneys, and those in active concert participation with them, from engaging in the policies and practices complained of herein, or any other race discrimination employment practice in violation of the above specified laws.

4. Enter an Order requiring defendants to make whole plaintiff and the class he represents by providing appropriate back pay, reimbursement of lost pensions, Social Security, experience, training opportunities, an immediate promotion to the position of District Chief, and other benefits in an amount to be shown at trial.

5. Award the plaintiff costs of this action, and a reasonable attorney's fee, including out-of-pocket expenses,

and such other and further relief as this Court may deem appropriate.

Respectfully submitted,

Ratner, Sugarmon, Lucas, Salky
& Henderson
By: /s/ Richard B. Fields
G. Philip Arnold
525 Commerce Title Building
Memphis, Tennessee 38103
Attorneys For Plaintiff

(Filed March 1, 1977)

(Caption Omitted in Printing)

ANSWER OF DEFENDANTS

Come the Defendants, Memphis Fire Department; Robert W. Walker, Director of Fire Services; the City of Memphis; Joseph Sabatini, Director of Personnel for the City of Memphis, in the above-styled and numbered case and for their Answer to as much of said Complaint that they are advised is competent, relevant and material, say:

I.

Defendants deny that this Court has jurisdiction of this cause under Section 703 *et seq.* of Title VII, 42 U.S.C. Section 2000(e)-5(f)(3), under 28 U.S.C. Section 1343(3)(4), or under 42 U.S.C. § § 1981 and 1983.

Defendants further deny that Plaintiff has standing to file an action for declaratory judgment and deny that Plaintiff or the alleged class are entitled to any other relief.

II.

Defendants admit that Plaintiff Carl W. Stotts is a black citizen but demand proof that he is a resident citizen of Memphis, Shelby County, Tennessee.

III.

Defendants admit the allegations contained in Paragraph No. 3 of the Complaint.

IV.

Defendants admit the allegations of Paragraph No. 4 of the Complaint.

V.

Defendants admit the allegations of Paragraph No. 5 of the Complaint.

VI.

Defendants admit the allegations contained in Paragraph No. 6 of the Complaint.

VII.

Defendants deny all of the allegations contained in Paragraph No. 7 of the Complaint.

VIII.

Defendants admit the allegations contained in Paragraph No. 8 of the original Complaint.

IX.

Defendants deny the allegations contained in Paragraph No. 9 of the Complaint.

X.

Defendants deny the allegations contained in Paragraph No. 10 of the original Complaint.

XI.

Defendants admit that Plaintiffs filed a Complaint with the District Office of the Equal Employment Opportunity Commission in Memphis, Tennessee, on or about August 22, 1975. Defendants deny that Plaintiffs received a "Notice of Right to Sue" and, therefore, deny that the Complaint in this matter was properly filed.

XII.

Defendants deny that Plaintiff is entitled to the relief requested for in Plaintiff's Prayer for Relief in the original Complaint.

XIII.

Defendants further deny each and every allegation in the Complaint not heretofore admitted nor specifically denied.

XIV.

Defendants request as affirmative relief that they be awarded the costs of this action together with reasonable attorneys' fees and other equitable relief to which they may be entitled.

XV.

WHEREFORE, Defendants move that the Complaint heretofore filed against them be dismissed.

Respectfully submitted,

By: /s/ Clifford D. Pierce, Jr.
City Attorney

By: /s/ Edward R. Young
Assistant City Attorney

[Certificate of Service Omitted in Printing]

(Filed June 19, 1979)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE
WESTERN DIVISION

No. C-79-2441

Comp. to C-77-2104

FRED L. JONES,
Plaintiff,

vs.

MEMPHIS FIRE DEPARTMENT; ROBERT W. WALKER, Director of Fire Services; THE CITY OF MEMPHIS; JOSEPH SABATINI, Director of Personnel for the City of Memphis,
Defendants.

COMPLAINT

1. This is an individual action brought pursuant to §706(f)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(f)(1), and 42 U.S.C. §1983 to redress discrimination on grounds of race in terms and conditions of employment on behalf of the named plaintiff. Plaintiff seeks a declaratory judgment pursuant to 28 U.S.C. §§2201, 2202, and preliminary and permanent injunctions. This Court has jurisdiction pursuant to §706(f)(3)(4) of Title VII, 42 U.S.C. §2000e-5(f)(3), and pursuant to 28 U.S.C. §1343(3)(4).

2. Plaintiff, Fred L. Jones, is a black citizen and a resident of Memphis, Shelby County, Tennessee.

3. The Memphis Fire Department at all times mentioned herein was and is the department of government

of the City of Memphis, charged with fire protection responsibilities of the City of Memphis.

4. Robert W. Walker is employed by the defendant Memphis Fire Department as its Director of Fire Services. In this capacity, he is the chief executive officer of the defendant Memphis Fire Department.

5. The City of Memphis is a municipal corporation organized and existing under the laws of the State of Tennessee. The city, pursuant to law, operates the Memphis Fire Department.

6. Defendant Joseph Sabatini is Director of Personnel for the City of Memphis, and in said capacity, also formulates policies governing employees of the City of Memphis and of said defendant Memphis Fire Department.

7. Plaintiff would show that he was hired by the City of Memphis as a candidate for the Memphis Fire Department on November 3, 1969. He presently holds the position of Fire Fighting Private.

8. Plaintiff avers that he has been denied a promotion to the rank of Fire Inspector on August 30, 1976 for which he was qualified solely because of his race. Plaintiff avers that white members of the Memphis Fire Department have been promoted to the position of Fire Inspector even though they are less qualified than plaintiff.

9. Plaintiff would show that he filed a Complaint with the District Office of the Equal Employment Opportunity Commission in Memphis, Tennessee on or about September 24, 1976. On June 8, 1979, plaintiff received a "Notice of Right To Sue" authorizing him to institute a civil action in the appropriate Federal District Court within ninety (90) days of receipt of said letter. This complaint is timely filed pursuant to said notice.

WHEREFORE, for the reasons stated, plaintiff prays that this Court:

1. Advance this case on the docket, order a speedy hearing at the earliest practical date, and cause this case to be in every way expedited.

2. Issue a declaratory judgment that defendants' acts, policies, practices, and procedures complained of herein violated the rights of plaintiff as secured under Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. §2000(2), *et seq.*, (Supp. 1972) and the Fourteenth Amendment to the United States Constitution.

3. Enter an injunction prohibiting the defendants, their agents, successors, employees, attorneys, and those in active concert participation with them, from engaging in the policies and practices complained of herein, or any other race discrimination employment practice in violation of the above specified laws.

4. Enter an Order requiring defendants to make whole plaintiff by providing appropriate back pay, reimbursement of lost pensions, social security, experience, training opportunities, an immediate promotion to the position of Fire Inspector, and other benefits in an amount to be shown at trial.

5. Award the plaintiff costs of this action, and a reasonable attorney's fee, including out-of-pocket expenses, and such other and further relief as this Court may deem appropriate.

Respectfully submitted,

/s/ Richard B. Fields
Ratner, Sugarmon & Lucas
525 Commerce Title Building
Memphis, Tennessee 38103
Attorney for Plaintiff

(Filed July 31, 1979)

(Caption Omitted in Printing)

ANSWER OF DEFENDANTS

Come the Defendants, Memphis Fire Department; Robert W. Walker, Director of Fire Services; the City of Memphis; Joseph Sabatini, Director of Personnel for the City of Memphis, in the above-styled and numbered case and for their Answer to as much of said Complaint that they are advised is competent, relevant and material, say:

I.

Defendants deny that this Court has jurisdiction of this cause under Section 706 (f)(3)(4) *et seq.* of Title VII, 42 U.S.C. Section 2000 (e) - 5(f)(3), under 28 U.S.C. Section 1343 (3)(4), or under 42 U.S.C. § 1983.

Defendants further deny that Plaintiff has standing to file an action for declaratory judgment and deny that Plaintiff is entitled to any other relief.

II.

Defendants admit that Plaintiff Fred L. Jones is a black citizen but demand proof that he is a resident citizen of Memphis, Shelby County, Tennessee.

III.

Defendants admit the allegations contained in Paragraph No. 3 of the Complaint.

IV.

Defendants admit the allegations of Paragraph No. 4 of the Complaint.

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Defendants admit the allegations of Paragraph No. 5 of the Complaint.

VI.

Defendants admit the allegations contained in Paragraph No. 6 of the Complaint.

VII.

Defendants admit all of the allegations contained in Paragraph No. 7 of the Complaint.

VIII.

Defendants deny the allegations contained in Paragraph No. 8 of the Complaint.

IX.

Defendants deny the allegations contained in Paragraph No. 9 of the Complaint.

X.

Defendants deny that Plaintiff is entitled to the relief requested in Plaintiff's Prayer for Relief in the Complaint.

XIII.

Defendants further deny each and every allegation in the Complaint not heretofore admitted nor specifically denied.

XIV.

Defendants request as affirmative relief that they be awarded the costs of this action together with reasonable

attorneys' fees and other equitable relief to which they may be entitled.

XV.

WHEREFORE, Defendants move that the Complaint heretofore filed against them be dismissed.

Respectfully submitted

By: /s/ Clifford D. Pierce, Jr.
City Attorney

By: /s/ Edward R. Young
Assistant City Attorney

[Certificate of Service Omitted in Printing]

CONSENT DECREE BETWEEN PLAINTIFFS AND DEFENDANT CITY OF MEMPHIS

(Reproduced in Petitions for Certiorari of Union and City at A.59)

(Filed May 4, 1981)

(Caption Omitted in Printing)

VERIFIED APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER FOR DEFENDANTS TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE WITH SUPPORTING MEMORANDUM

Pursuant to F.R.C.P. R. 65, plaintiffs apply for a temporary restraining order and an order for defendants to show cause why a preliminary injunction should not issue.

On Tuesday, May 5, 1981, at 9:00 A.M. the Memphis Fire Department is scheduled to have a meeting with employees who will be given the opportunity to either voluntarily accept a layoff or be reduced in rank. Approximately 17 black lieutenants and 7 black drivers have received notification that they are among the 35 employees who are to attend this meeting. These lay-offs and reductions-in-rank are to be carried out on a seniority basis, with the employees who have the least amount of city-wide seniority to be laid off or demoted first. Because there are only 15 black drivers and 29 black fire-fighting lieutenants, a layoff or reduction-in-rank will effectively destroy the affirmative relief granted by this Court in the Consent Decree entered on April 25, 1980. Approximately 300 white drivers and 225 white lieutenants will be unaffected by the layoff and reducation-in-rank policies. Other black employees in other Fire Department bureaus may be laid off if the seniority criterion is used.

The guidelines for granting preliminary injunctive relief are outlined in *Securities & Exchange Commission v. Senex Corp.*, 534 F.2d 1240, 1241 (6th Cir. 1976):

(1) that a substantial question is at issue;

(2) that there is a possibility of success on the merits;

(3) that a balancing of injuries to the parties requires preliminary injunctive relief; and

(4) that the public interest would be served by such preliminary relief.

In a case similar to this one, the Sixth Circuit Court of Appeals upheld an injunction against the Toledo Fire Department. *Brown v. Neeb* (No. 80-3468-76, March 3, 1981) (copy attached). Although layoffs were not specifically mentioned in the consent settlement, the district

court entered an order preventing the city from laying off minority firefighters. What the Memphis Fire Department proposes to do is even more damaging to the goal of overcoming the historic under-representation of blacks by demoting black lieutenants in leadership positions. Promotional exams are scheduled for the week of June 1, 1981, and it is uncertain whether demoted lieutenants will be eligible to take the captain's exam.

For these reasons, plaintiffs request that a temporary restraining order be granted and that an order issue for defendants to show cause why a preliminary injunction should not issue after an appropriate hearing.

Respectfully Submitted,

/s/ Richard B. Fields
Ratner & Sugarmon
525 Commerce Title Building
Memphis, Tennessee 38103
Attorney for Plaintiffs

[Verification and Certificate of Service Omitted in Printing]

(Filed May 4, 1981)

(Caption Omitted in Printing)

TEMPORARY RESTRAINING ORDER

Upon motion of plaintiffs' counsel for a temporary restraining order in this cause and it appearing that class members will suffer irreparable injury if plaintiffs ultimately prevail and layoffs or reductions in rank in the Fire Department have been made;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that defendants, their officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with them are hereby restrained from laying off or reducing in rank any black employees in the Memphis Fire Department.

Plaintiffs' application for a preliminary injunction will be heard at 2 PM on the 8th day of May, 1981, in Courtroom No. 2, U.S. District Court, Memphis, Tennessee.

/s/ Robert M. McRae
United States District Judge

Date May 4, 1981

Time: 11:15 AM

(Entered May 5, 1981)

(Caption Omitted in Printing)

CONSENT ORDER ALLOWING INTERVENTION OF FIREFIGHTERS LOCAL UNION NO. 1784

This cause came on to be heard by consent of the parties; and

It appearing to the Court that the parties have agreed that Firefighters Local Union No. 1784 may intervene in this cause and file its answer to the plaintiffs' application for injunctive relief filed herein, and for good cause;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Firefighters Local Union No. 1784 be, and it is hereby, allowed to intervene in this cause and file its answer to plaintiffs' application for injunctive relief.

Robert M. McRae, Chief Judge

.....

Date

Ratner & Sugarmon
By Richard B. Fields
Attorneys for Plaintiffs
Clifford D. Pierce, Jr.,
City Attorney
Attorney for Defendants

Hanover, Walsh, Jalenak & Blair
By /s/ Allen S. Blair
By /s/ James R. Newsom III
Attorneys for Intervenor

(Filed May 5, 1981)

(Caption Omitted in Printing)

ANSWER OF FIREFIGHTERS LOCAL UNION NO. 1784 TO PLAINTIFFS' APPLICATION FOR INJUNCTIVE RELIEF

Comes now Firefighters Local Union No. 1784 and respectfully submits its answer to the plaintiffs' application for injunctive relief herein.

1. Firefighters Local Union No. 1784 denies plaintiffs are entitled to an injunction herein inasmuch as:

a. Plaintiffs are not likely to succeed on the merits;

b. Plaintiffs will not suffer irreparable injury under the law;

c. A balancing of the injuries to the parties requires that preliminary injunctive relief not issue; and

d. The public interest will not be served by preliminary injunctive relief.

2. Firefighters Local Union No. 1784 and its members have seniority rights entitled to protection pursuant to the City of Memphis Fire Division seniority system, which is a bona fide seniority system.

3. Should any injunctive relief be issued by the Court under 42 U.S.C. §§1981, 1983 or 2000e, et seq., it must be an injunction against all layoffs in order to protect the rights of Firefighters Local Union No. 1784 and its members under the bona fide seniority system.

WHEREFORE, Firefighters Local Union No. 1784 prays:

1. That plaintiffs' application for injunctive relief be denied and dismissed;

2. That should any injunctive relief be issued pursuant to 42 U.S.C. §§1981, 1983 or 2000e, et seq., the Court enjoin all layoffs to protect the rights of Firefighters Local Union No. 1784 and its members; and

3. For such other and further relief to which it may be entitled.

Respectfully submitted,

Hanover, Walsh, Jalenak & Blair
By /s/ Allen S. Blair
By /s/ James R. Newsom III
Attorneys for Firefighters Local
Union No. 1784
219 Adams Avenue
Memphis, Tennessee 38103
(901) 526-0621

[Certificate of Service Omitted in Printing]

(Filed May 8, 1981)

(Caption Omitted in Printing)

ANSWER OF DEFENDANTS TO PLAINTIFFS' APPLICATION FOR INJUNCTIVE RELIEF

Come now Defendants and respectfully submit their answer to the Plaintiffs' application for injunctive relief herein.

1. Defendants deny that Plaintiffs are entitled to an injunction herein inasmuch as:

a. Plaintiffs are not likely to succeed on the merits;

b. Plaintiffs will not suffer irreparable injury under the law;

c. A balancing of the injuries to the parties requires that preliminary injunctive relief not issue; and

d. The public interest will not be served by preliminary injunctive relief.

2. The layoffs and reduction in rank proposed by Defendants are to be made pursuant to a bona fide seniority system which is immune from attack under §706(h) of Title VII, 42 USC 2000e, *et seq.*, as well as 42 USC §§1981 and 1983.

3. Any complained of actions to be taken by Defendants are to be made on the basis of seniority, which actions are legal and appropriate.

4. A preliminary injunction enjoining the facially neutral layoff system on the basis of the previous consent decree is inappropriate as the parties did not negotiate, agree to or include layoff procedures within the 1980 Consent Decree that is the basis for Plaintiffs' application.

WHEREFORE, Defendants pray:

1. That Plaintiffs' application for injunctive relief be denied and dismissed; and

2. For such other and further relief to which it may be entitled.

Respectfully submitted,

Clifford D. Pierce, Jr.
City Attorney
By: /s/ Louis P. Britt III
Assistant City Attorney
Attorneys for Defendants
125 N. Main
Memphis, Tennessee 38103
(901) 528-2614

[Certificate of Service Omitted in Printing]

As counsel well knows, on yesterday I asked the attorneys, or at least one attorney for each party, to come over to my chambers for a very brief conference that was mainly for the purpose of determining how we were going to proceed, and to get an expression from the attorneys as to what they thought the issues were.

One of the problems with these injunction hearings centers around the fact that the lawyers don't have the usual time to develop the issues, and take discovery, and exchange information, and to call on each other to state what they think the issues are, and what they are.

So, it sometimes is very awkward. One attorney will think we are going in one direction, and the other thinks it's [4] another.

I got an idea from the lawyers—I am not sure that they were finally decided on what route they were going to take. But one of the things that I did determine, and I state before we start the hearing, that I see no area where this Court has the authority to tell the City officials that they cannot, based on their own judgment, lay off some people. Now, I don't know whether people think I'm going to tell the City that they can't lay anybody off, but I have ruled that that is not an issue.

Now, the appellate authorities, and most particularly the 6th Circuit authority, has spoken to this subject when you have a consent Decree and there has been a change of circumstances. And then the District Court can, and should be, called upon to determine whether some layoffs, and the method of laying people off is going to create discrimination, which the Consent Decree undertook to avoid.

[5] Now, I guess you might say that this Court figures, that based on the results of the hearing, the Court does have authority, if the record supports it, to tell the City that they cannot lay people off in a manner

(Caption Omitted in Printing)

PRELIMINARY INJUNCTION HEARING
FRIDAY MAY 8, 1981

[2] APPEARANCES

For the Plaintiffs:

RICHARD B. FIELDS, ESQ.
THOMAS M. DANIEL, ESQ.
Attorneys at Law
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[3] FRIDAY, MAY 8, 1981

(2:00 o'clock p.m.)

THE COURT: Let me make some observations before I call on counsel and we proceed with the hearing.

that will perpetuate discrimination against black people. Now, it is that simple.

Now, it is not that simple to reach a decision. But that is what I feature we are going to be talking about today. And of necessity, we want to make it as brief as possible; that is, we don't have time to do a lot of investigating on the witness stand. I understand some depositions have been taken.

Now, first, I will call on counsel for the Plaintiffs. Of course, we are talking about two cases, Stotts and Jones versus the Memphis Fire Department.

MR. FIELDS: Yes, sir.

If I might, I would like to provide you with copies of the depositions. [6] They have not been filed yet, I have just received them from the Court Reporter.

THE COURT: All right.

MR. FIELDS: In case we do refer to them during the hearing.

Now, I will have three exhibits, Your Honor. And those are the three that were attached to my Supplemental Memorandum yesterday.

THE COURT: All right.

MR. FIELDS: I would like to officially file those. Unfortunately, they are stapled together.

THE COURT: You say unfortunately they are stapled together?

MR. FIELDS: Yes. All three together instead of each individually.

For purposes of this hearing, Exhibit 1 will be the Layoff Policy of May 4th.

(Thereupon, the above described document was marked as Hearing Exhibit No. 1, and the same will be found among the exhibits in the cause.)

[7] MR. FIELDS: Exhibit 2 would be the list of employees scheduled for a reduction in rank or demotion.

(Thereupon, the above described document was marked as Hearing Exhibit No. 2, and the same will be found among the exhibits in the cause.)

(Judge's secretary handing document to Clerk.)

THE COURT: I think she has got something that may have been filed since I came on the bench.

MR. FIELDS: All right, sir.

THE COURT: All right.

MR. FIELDS: And Exhibit 3, Your Honor, is my summary and print out sheet of the status of employees in the Fire Department as of 1-22-81. That is the latest information I have received from the City.

THE COURT: All right.

(Thereupon, the above described document was marked as Hearing Exhibit No. 3, and the same will be found among the exhibits in the cause.)

[8] MR. FIELDS: Now, Your Honor, would you like an opening statement, or should we go directly to the proof?

THE COURT: I would rather not have an opening statement.

MR. FIELDS: All right, Your Honor. I would like to call Mayor Chandler, then, as my first witness.

THE COURT: All right.

Now, is one of the depositions you filed that of the Mayor?

MR. FIELDS: Yes, it is, Your Honor.

THE COURT: And did you want to call him too?

MR. FIELDS: Yes, sir.

THE COURT: All right.

Mr. Mayor, would you be kind enough to come around and let us give you an oath, and ask you to testify, please.

[9] MAYOR WYETH CHANDLER,

the said witness, having been first duly sworn, was examined and testified as follows:

MR. FIELDS: Before I begin the examination, Your Honor, I'd like to use the adverse witness rule. I think the Mayor and I, we are adverse at this point.

THE COURT: You don't have to call him adverse. He is associated with the other party.

MR. FIELDS: Oh, yes, sir.

THE COURT: He is the other party. You may ask leading questions.

MR. FIELDS: All right, Your Honor. Thank you.

THE COURT: With this many people, you know, you could be misunderstood.

MR. FIELDS: Yes, sir.

THE COURT: Please proceed.

MR. FIELDS: Thank you.

Direct Examination

By Mr. Fields:

Q. Mayor Chandler, I would just like to go into the history of the layoff policy as had been adopted now.

[10] Exhibit 1, which I believe I showed you yesterday, is a copy of a layoff policy dated May 4th, 1981.

Would you explain to me how that was formulated? Was that done at your direction? A. When we first considered layoffs last year, we, of course, did layoff—and this year, have laid off several employees. We did that under an unwritten policy. We did it basically the same way that we are proposing these layoffs.

I asked Mr. Sabatini, in view of the fact that we were going to have obviously a vast number of layoffs next year on July the 1st, depending on what the Council

did, to prepare a full layoff policy that would protect the rights of the employees as far as possible, which insured them of any benefits that the City could possibly give them, and also allow us to move forward as rapidly as possible to notify those employees that on July the 1st they would be gone, and this will be the situation in their treatment.

Q. All right.

You stated in your answer that there has never been any layoffs at the City Government while you have been there; is that correct? A. Not until, I think, about thirty days, sixty days [11] ago, when we laid off some people in probation.

That was due to the fact that Attorney General Stanton cut out funds from the probation area of payments they made over at City Court. And the result was we didn't have any money.

And I think in another area where the County failed to contribute in the area of welfare, I think we did layoff some employees in that area. Both of those were done on the basis of seniority, and had been accomplished there and laid off.

Q. All right.

Now, Mr. Mayor, this policy was written up at your direction, I take it? A. At my request.

Q. At your request. A. It was presented to me for my review. I reviewed it and approved it.

Q. All right.

Now, it says that in the layoff policy that it is at your discretion what classifications are going to be laid off, you determine that. Would you explain how you determine the layoff to be had in the Fire Department? A. Well, of course, I have that broad discretion. What happened basically, is that each department of the [12] City, the Fire, Police, and all other departments, formulate a main-

tenance budget which they feel is necessary to carry out the function of their departments.

They did so this year. It came out, as I recall, to a gap between anticipated revenues and expenditures that they would need to maintain those departments, of about thirty-eight million dollars.

They went back to the drawing board, and each department draws up in a given formula, reduced service level three, two, one, etc., showing a reduction not only in the department, but each sub-department.

And police, for example, it affected uniform patrol, traffic, etc. Each department is now down at the level of reduced level one, two, or three.

The director, then, is told that he must reduce his budget. He then prioritises all of these reduced service levels. And for example, in the Fire Department, may reduce fire fighting to reduced service level two. And he may reduce gas masks or air masks to reduced level three, or whatever. He reduces his division to what he thinks he needs best to serve the people of the City.

Now, we didn't reduce the entire thirty-eight million dollar deficit, as you know. We still have, when it was submitted to the council, 18.6 million [13] dollars in deficit, which would require a seventy cent increase in taxes. We don't know what they are going to do with that. In my judgment, they may very well not pass such a tax increase, and we will be cutting further in each department, but by that formula.

In other words, the division directors will again be saying, according to our priorities, these things should be reduced. This department should be reduced to this level of service. That means twenty-five people, for example, will be laid off. At that point when he says, for example, in the Fire Department, we will be reducing five fire squadrons. I don't know that there are two privates, a

driver and a lieutenant on a fire squad, even though I believe it to be in that order. I mean just by common knowledge.

But I don't say that we are going to reduce by one lieutenant, one driver and two privates. We just say that we will reduce by five squads. And those people, whoever they may be, those reductions would be made.

Q. Well, I would like to pick up on one point that you made. There is a possibility, although it is not clear now, that there may even be more layoffs in the future? [14] A. In my opinion there is a definite possibility. The council has got the matter. I have heard rumors, you know. I don't know whether they are true or not, but they are talking about a maximum tax increase for the City somewhere in the neighborhood of thirty or forty cents. I hope that's not true because I think that would be adverse to the City, and, of course, would effect even more.

As you know, we have purposely not laid off anybody heretofore. We have used attrition to factor people out.

Q. All right.

Now, Mr. Mayor, you said that you just take your suggestions from the department heads. Are you planning on hiring any people in the City now, in any part of City Government? A. Yes. The only place that we intend to raise the number of personnel during the coming year, the number of slots, will be in the police department in the area of patroling and detective division.

I might mention one thing there. Over the years we have been working on these budgets. They really have never compared our funding of each department as compared to cities throughout the United States. And over the last year we have done that. And there were [15] two areas that stood out where we were paying a much higher percentage of our total budget in two areas than

we were in all other areas. Those were in sanitation. And I think everyone knows that. We are the only city—or were the only city—left in the country that had twice a week back door pick up. And that was costing a lot more money than other cities.

And the Fire Department. In the Fire Department, our percentage that was spent was I think—I don't remember the figures, but it seemed like twenty-two percent above the average of all of the cities of our size, comparable size, in the United States.

And the result was that we looked very intensely to see why that was true. And we found that there could be some cuts in that area.

Q. I understand. The issue is not whether they need it cut at this hearing, it is how they are done. A. All right.

Q. Okay.

Now, when you had formulated this policy, did you direct, or did you yourself consider, what the impact would be upon the black employees of the Fire Department? [16] A. I did not.

Q. Did you consider that perhaps the seniority system, as such, would have an adverse impact because for a number of years the City did not hire blacks in the department, or very few? A. No, I didn't consider that at all. In my opinion, I had never dealt with layoffs, or firings, or whatever, based on any of that.

It is my opinion that under the Consent Decree, we agreed to hire, we agreed to promote, and we agreed to do it in percentages, or what have you. And be fair and equitable, and I felt that that was fair and equitable, that I did then agree to it, consented to it.

But I certainly felt differently towards any policy that would put people out of work, put them on the street, based anything other than on the thing that has

been used in every city in this country, in every business in this country, and by the city, and in the Consent Decree since 1974, and that is the seniority policy in the union agreement, and everything else.

Q. Well, you realize that the Consent Decrees do not contain any language about layoffs? A. I think one of the Consent Decrees says seniority is one of the factors in some regard, I don't [17] know what regard it is.

Q. All right, sir.

But this is the first layoff policy that the City has ever had? A. With the exception of the few that were laid off this year, we have never had not only a policy, we have never laid anybody off.

Q. All right.

One other question, Mr. Mayor. Did you ever consider, instead of laying off people, just reducing the number of hours the individuals worked, so you wouldn't have to layoff individuals, but you might make an across the board cut. A. That may have been considered by the Fire Department. I think it would be probably—well, I don't know how it would work if you tried to shift people, especially in their twenty-four hour jobs. I'm not sure how that would work out.

Q. But you did not consider that yourself? A. No, I didn't personally consider it.

Q. All right. A. Let me add one more thing. Now, with layoffs, you are talking about how it would adversely affect people. As I understand it, and I may be wrong, but as I understand it, there will be some thirty-eight, or [18] whatever, fire fighters, for example, laid off. And of those, the majority of them would be white.

Now, there will be some kickback downs. And I know that you feel very strongly about that. At some reductions from lieutenants to drivers, and so forth, who

would impact, perhaps, blacks. I just discovered it, I didn't know about it.

But I hope that you understand, and I certainly want Judge McRae to understand, that they are not losing what they gained by the promotion to lieutenant, because they are kept on a roster, and it is absolutely almost certain that all of those people would be restored to their positions as lieutenant, they now having been bumped down, or having been bumped down because they are less senior. And being lieutenants, because they were promoted under this policy, we bump down temporarily, and in all likelihood will be back as a lieutenant maybe within six months, and certainly within a two year period.

Q. There is no guarantee of that, though, is there? A. Not a guarantee in blood, but from a historical factor of attrition, and the way the Fire Department operates under what they consider what will happen, it can be reasonably assured.

Q. Well, but you can't even assure us today that [19] there won't be further layoffs and more lieutenants won't be affected? A. I can't guarantee you that there will be any layoffs or none, because that is a decision of the council or the City of Memphis, it is not mine to make.

Q. All right.

Now, you mentioned the lieutenant. Were you given the statistics of how it would affect black lieutenants? A. I don't know the statistics. I know that it was high on the black side.

Q. Okay.

I believe that we filed with the Court today, that fifty-five percent of the black lieutenants in fire fighting would be demoted, whereas only twenty-five percent of the whites? A. I don't know those figures.

Q. Well, did you consider instead of using city wide seniority, using seniority within the rank because you have had a number of promotions within the last year? A. I did not. City-wide seniority has been used in every department. It is the agreement with the union. It has always been used and I have never considered anything else.

[20] Q. Is it your position that the agreement with the union is enforceable in a Court of Law?

MR. LEWIS: Objection, Your Honor.

THE WITNESS: I don't know whether it is or not. It is enforceable in my mind because I signed it.

MR. LEWIS: Excuse me, Mr. Mayor.

THE COURT: I don't think that is a fair question to ask the Mayor. That is not his decision.

THE WITNESS: That is for some Judge to determine.

THE COURT: Well, there is a big debate about that, and I don't know if it is really necessary to the issues in this suit.

MR. FIELDS: All right, Your Honor, That's fine.

THE COURT: All right.

MR. FIELDS: Okay. Excuse me.

(Counsel conferring.)

MR. FIELDS: That's all I have, [21] Your Honor. Thank you.

THE COURT: All right.

Mr. Blair, I think you indicated that you might have a few questions.

MR. BLAIR: If Your Honor please, at this time of this witness, I have no questions.

THE COURT: All right.

MR. LEWIS: Your Honor, I think rather than just question the witness, we are prepared to enter into a facts stipulation. I understand there may be some objection as

to the admissibility but we would propose a stipulation of fact that the 1974 Consent Decree, which the Mayor referred to in his testimony as requiring city-wide seniority and personnel action at paragraph 6(a). This is a case styled *United States of America v. City of Memphis.* Civil Action No. C74-286, provides at that paragraph: It says, "The City shall for all purposes [22] of promotion, transfer, and assignment, compute the seniority of the persons in the affected class, as defined in paragraph five—" which is black city employees—'As the total seniority of that person with the City.'"

MR. FIELDS: Your Honor, I would object to that since it says absolutely nothing about layoffs, and it is not in any conflict with the Decree we've entered.

MR. BLAIR: May it please Your Honor, we will join in that stipulation.

MR. FIELDS: Oh, I stipulate that is what it says, Your Honor, I just object to its admissibility in this hearing.

THE COURT: Well, all right.

Maybe we are getting into a technicality here. I consider that the whole Consent Decree is of necessity part of this record.

Now, I don't want to get into semantics problem about what is admissible, but I overrule whatever [23] objection Mr. Fields is making. This, of course, is what you all can argue.

But if anybody doubts this, I think you ought to make the consent agreement a part of the record. Isn't this filed in the same cause?

MR. BLAIR: It is in a different cause number, but it is referred to in the Consent Decree in this cause.

MR. FIELDS: Your Honor, if I could explain.

What they are talking about is the '74 Consent Decree in Judge Wellford's Court with the Justice Department.

Any language in our Consent Decree says that there should be nothing in our Consent Decree that conflicts that with Consent Decree. That is on the basis with which the City signed that Decree.

The part Mr. Lewis read says, that in that Decree it says for the purposes of promotion, assignments, transfers.

THE COURT: All right.

[24] MR. FIELDS: They should use city-wide seniority.

But my argument is that doesn't conflict with our Decree because it doesn't say anything about layoffs, neither Decree says anything.

THE COURT: Well, that is the Decree in the city-wide matter.

MR. FIELDS: Right, that's correct, Your Honor.

THE COURT: All right.

MR. LEWIS: As Mr. Fields says, Your Honor, it specifically provides in the '80 Decree, that is at issue, this Decree is not intended to conflict with any provisions of the prior Decree. Rather, this Decree is intended to parallel and supplement the relief provided in that Consent Decree.

THE COURT: All right.

Well, I will still permit them to admit it, but I am not holding that it applies to layoffs.

MR. FIELDS: Yes, sir, thank you.

[25] MR. LEWIS: Your Honor, I guess we would then move the admission of this exhibit. I didn't anticipate this, so I hope—

MR. FIELDS: (Interjecting) That's fine.

(Referring to extra copy of document.)

THE CLERK: Exhibit 4.

(Thereupon, the above described document was marked as Hearing Exhibit No. 4, and the same will be found among the exhibits in the cause.)

THE COURT: Do you have any questions of the Mayor?

MR. LEWIS: No, Your Honor, not of this witness.

THE COURT: All right.

Thank you, sir.

THE WITNESS: Thank you, sir.

(Witness excused.)

MR. FIELDS: I would like to call Mr. Joe Sabatini.

[26] JOSEPH D. SABATINI,

the said witness, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Fields:

Q. Would you state your full name for the record, please. A. Joseph D. Sabatini.

Q. What is your position with the City of Memphis? A. Director of Personnel.

Q. All right.

How long have you been Director of Personnel? A. Since February, 1976.

Q. And Mr. Sabatini, at the Mayor's direction, as I understand it, you and your staff drew up this layoff policy; is that correct? A. That's correct.

Q. When you drew it up, did you consult with me—well, I'm sorry. Did you consider consulting with the Plaintiff in the Stotts case about its adverse impact on blacks? A. I did not.

Q. Why not? A. I felt that the historical seniority provision that were identified in the City policy, were identified [27] in the Consent Decree, were identified in various union memorandum, and in our research of

other layoff policies in the public and private sector indicated that seniority was the natural course.

Q. All right.

Did you consider any other alternative to laying off by seniority? A. No, we did not.

Q. Did you consult the union about this policy? A. Did not consult the union.

Q. Did you have conversations with them about it? A. Yes, I did.

Q. Prior to its implementation on May the 4th? A. Yes, I did.

Q. All right.

Did you consult the United States Justice Department about it? A. Did not consult, reviewed again the principles of the policy.

Q. I'm sorry, would you state that again? A. Did not consult, did in fact review the principles of the policy.

Q. Okay. But you did not review those with the Plaintiff in this case? A. That's correct.

[28] MR. LEWIS: Your Honor, I think it is inconsistent for Mr. Fields to object on the one hand to something that we introduced because there is nothing about layoffs in their Decree, and then apparently attempting with him, that because he has this Decree somehow the City was obligated to discuss layoffs with him.

And for that reason, I don't see the relevance of this line of inquiry.

MR. FIELDS: Your Honor, in our Decree, at paragraph 11(b) in the reporting, there is language that: "Should any dispute or controversy arise concerning Defendant's application of adherence to the provision of this Decree, Defendant and Plaintiff's counsel should confer with the Attorney General and seek a mutually agreeable resolution of the dispute."

I would like to go on, if I may?

THE COURT: All right.

I overrule the objection.

[29] MR. FIELDS: Thank you.

Q. (By Mr. Fields) Now, Mr. Sabatini, didn't we have a discussion a number of weeks ago about this, that we would object if seniority were used for the layoff policy because of its adverse effect on blacks? A. I believe you and I in a phone discussion on other matters did discuss the fact that the budget process indicated that layoffs were going to be necessary. It was publicized in the newspaper.

And I do believe you stated, that it would be your position that it would be other than city-wide seniority. And I believe that I stated that it would be our position, and our design, that the layoff policy should be in fact by city-wide seniority, but that that bridge would probably need to be crossed when we were able to determine the balancing effect to the bumping, to determine who was to be affected.

Q. All right. And at that time I told you about this recent decision in the 6th Circuit; is that not correct? A. You mentioned it to me, yes, sir.

Q. And I provided a copy to Mr. Pierce? I mean, do you know that? A. I think that is true, yes.

Q. All right.

[30] Now, instead of consulting any further, you decided to notify employees as of Tuesday of this week, who would be laid off and who would be bumped; isn't that correct? A. In line with our mechanics to inform employees as to the layoff policy, yes, that was scheduled for this past Tuesday.

Q. All right.

Without further consultation with Plaintiff's counsel, me? A. Excuse me?

Q. Without any further consultation with me; is that correct? A. That's correct.

Q. All right. And is this the list of employees in the Fire Department to be bumped or demoted? A. I believe this list may have been put together by the fire division, and I think that the list is accurate. But the Tuesday meeting was the meeting of those people that were being affected in terms of their position was being abolished or eliminated in the next year's budget.

If that is consistent with this list, then that is true.

Q. Well, we will get further testimony about that.

[31] My understanding, the Tuesday meeting was with everybody affected by the layoff policy, not just those to be abolished, but those to be bumped as well? A. I believe that's true.

Q. Okay.

Mr. Sabatini, do you remember what the percentage of blacks in the Fire Department was in 1970—

THE COURT: (Interjecting) Excuse me. What is that exhibit number?

MR. FIELDS: I'm sorry, Your Honor. That is Exhibit 2.

THE COURT: What do you say it is?

MR. FIELDS: This is the list of Fire Department employees who were listed on a seniority basis that were to be bumped back to various positions.

In my Supplemental Memorandum, like you see there, there are sixteen black lieutenants on that list, one white lieutenant.

THE COURT: Now, the witness [32] said he didn't prepare this list, where did you get it?

MR. FIELDS: I got it from the Fire Department. But I thought he had something to do with that list.

THE COURT: All right. If you think it's right, but I—

MR. FIELDS: (Interjecting) Okay. Well, we will have Director Walker here.

THE COURT: All right.

THE WITNESS: If I may, Your Honor, to clarify the issue. There are other classifications in other bureaus in which layoffs are being effected. In the fire division more positions are being abolished and eliminated. And if I am not mistaken, this list includes just fire fighters; is that correct?

MR. FIELDS: That's correct.

THE WITNESS: I believe that everyone involved in the abolishment or elimination of positions was scheduled for that Tuesday meeting.

[33] MR. FIELDS: Right, I agree with that.

Q. (By Mr. Fields) Do you remember what the percentage of blacks was in the Fire Department when the '74 Consent Decree was entered? A. I do not recall it, I'm going to guess it was three or four percent.

Q. Thank you.

MR. FIELDS: Just a moment, Your Honor.

(Counsel conferring.)

MR. LEWIS: Mr. Sabatini, picking up at that point—

MR. FIELDS: (Interjecting) Excuse me, Mr. Lewis.

MR. LEWIS: I'm sorry, I apologize.

THE COURT: I thought you were through.

MR. FIELDS: I'm sorry, Your Honor.

(Counsel conferring.)

MR. FIELDS: Thank you. Go ahead.

THE COURT: Come on back.

[34] Cross Examination

By Mr. Lewis:

Q. Do you know what the percentage of black persons employed by the fire division for the City of Memphis

is at the current time? A. Approximately eleven and a half percent.

Q. Do you know what the percentage of black persons hired by the Fire Department since entry of the Consent Decree in 1974 has been in relation to the total number of hires by that division? A. Under the '74 Consent Decree, and to-date, if you were to consider all new entries into the fire division, the percentage of black would be approximately forty-six percent.

However, when you also consider rehires—and I do believe that these are two different recruiting efforts as a matter-of-fact—but when you consider the obligation and commitment under the '74 Consent Decree in terms of brand-new hires, and the recruiting efforts associated, and so forth, the black percentage is approximately fifty-six percent.

Q. So that since the Consent Decree in 1974, with regard solely to persons newly hired by the Fire Department, your testimony is that it is approximately fifty-six percent black employees? [35] A. That's correct, since 1974.

Q. With regard to promotions since the time of entry of the 1974 Consent Decree, Mr. Sabatini, do you know the percentage of promotions in the fire division that have been black persons? A. Since '74, the overall promotions in the fire division were approximately sixteen and seventeen percent black.

Q. Now, if I can direct your attention to the layoff policy that has been introduced as an exhibit. What is the basis for determining who will be laid off in that policy? A. The basis, of course, is city-wide seniority.

Q. Did that policy exist, of city-wide seniority, prior to the time that the layoff policy was drawn up? A. You mean a specific layoff policy existing?

Q. Yes, sir.

Prior to the time of the current layoff policy that was drawn up, was there a city-wide seniority policy in existence? A. In my opinion, yes, in several areas. That would include the memorandum of understanding of the various employee organizations. That includes City policy that dates back to 1973.

Q. All right, sir. [36] A. This Consent Decree, and so forth.

Q. You mentioned the union negotiations. Specifically with regard to the union that represents the fire employees, is that a matter which has been negotiated with that union? A. The city-wide seniority provision for seniority purposes was entered into the memorandum of understanding in 1975 with the local.

Q. And does it continue to be a provision of the memorandum with that union to-date? A. Yes, it does.

Q. Is there a layoff provision specifically within that agreement? A. Yes, there is a layoff language item, yes.

Q. Does that layoff language also say that seniority is the method by which persons will be selected for layoff in the event of layoffs? A. Yes, it does.

Q. Are there positions other than the ones that had been mentioned so far that are affected by the layoffs contemplated in the fire division? A. Yes, I believe there are positions eliminated or abolished in five, maybe six, of the bureaus in the fire division, which includes bureaus such as the alarm office, administration, apparatus, maintenance, fire [37] prevention.

Q. Is it currently possible to know exactly which employees may be laid off under the layoff policy? A. Not exactly. The reason for that being, is that there are—employees have an opportunity to exercise an option, once they are notified that the position is being abolished or eliminated.

That option can go anywhere from retirement, if they are eligible, to accepting a layoff, to the street. And then also there are factors that enter in between now and the end of the fiscal year, which relate to attrition, or resignations, terminations, whatever, that might affect the layoff.

Q. Mr. Fields asked about a meeting with those people that were to be affected by the layoff. If I understand what you just testified to, that would be a tentative understanding; is that correct? A. Certainly. What we were doing, was attempting to advise those people whose positions had been abolished or eliminated, what their options were. And that would carry as a tentative measure until the 26th, I believe it is, of June, which is when everything would occur, as of that date.

Q. How is that a significant date? A. That is the last pay period in this fiscal year. [38] The budget process has eliminated those positions, or abolished them for the next fiscal year, which begins July the 1st.

Q. As far as the administration is concerned, are you able to wait until June the 26th to determine what is going to happen or what layoffs, if any, will be required to balance the budget? A. In the policy we are committing to a thirty day notice. So, that does put us under a fairly tight schedule.

Q. Is that also in the memorandum of understanding with the Fire Fighters Union? A. Yes. As we develop the layoff policy, we reviewed not only the other policies, but we reviewed all agreements and found that the only one in which a thirty day requirement was there was in the fire fighters agreement. Therefore, we incorporated that into the City policy.

Q. Now, with regard to the council, is there any requirement, first of all, that the City budget be in balance?

A. There is a requirement that the City budget be in balance at the end of the fiscal year.

Q. What is the fiscal year for the City? A. From July 1st to June 30th.

[39] Q. Does the council pass on the budget submitted by the administration? A. Yes, they do.

Q. When do you anticipate that the council will be passing on the budget to be submitted? A. I believe the end of May or early June. I'm not sure when that would occur.

Q. Mr. Sabatini, do you know how many employees within the fire division will be affected as per current forecast by that department? A. I believe the figure is fifty-five positions will be eliminated or abolished, in which there are current employees.

THE COURT: There are what?

THE WITNESS: Fifty-five positions currently that are being abolished or eliminated by the budget in which there are current employees.

Of course, that figure can vary from day-to-day, depending on resignations, or turnover, other attrition factors.

Q. (By Mr. Lewis) The Plaintiff's memo in this matter refers to positions of lieutenant, driver, [40] inspector, and private. Are those in a particular bureau in the Fire Department? A. This is the fire fighting bureau of the fire division, that's correct.

Q. Of the fifty-five layoffs—

MR. FIELDS: (Interjecting) Excuse me. That isn't correct.

THE COURT: What?

MR. FIELDS: There are three that are fire fighting, and one that is fire prevention.

THE WITNESS: Repeat the question again, please.

MR. BLAIR: Was that an objection or is Mr. Fields testifying?

THE COURT: Well, I think he is just helping, I guess.

MR. LEWIS: If we are corrected, we are corrected. Are we corrected?

THE WITNESS: Repeat the question, please.

Q. (By Mr. Lewis) What I asked was with regard to lieutenants, drivers, and privates, and inspectors, is that all one bureau? A. Inspectors are in fire prevention.

Q. But the other three are in fire fighting? [41] A. The other three are in the fire fighting bureau.

Q. How many of the fifty-five total within the Fire Department division that are contemplated for layoff are included in the fire fighting bureau? A. If my figures are correct, I believe there will be about forty positions abolished or eliminated in fire fighting.

Q. Do you know how many inspectors are anticipated to be affected by the layoff? A. I don't recall that exact figure. I believe the inspectors were two, I'm not sure.

Q. So, if your surmise is correct, there, there are thirteen people outside of the classification that I have mentioned that will also be affected by the layoff? A. Yes. There are employees in the alarm office. There are employees in fire apparatus, maintenance, and other bureaus.

Q. Mr. Sabatini, do you have any information regarding the historical attrition rate within the fire division among employees? A. The specifics by classification, I do not recall. But I am aware that since January of '78, there have been eighty positions that have turned over in the fire [42] division.

Q. Is that eighty positions total, or eighty positions above a certain level? A. That is eighty positions above, if I recall correctly, above the lieutenant level.

Q. Could that be lieutenant and above? A. It could be. I recall the eighty, but by classification, I am really not sure of.

Q. Mr. Fields asked you about a conversation with the Justice Department regarding the proposed layoff policy. Did you have such a conversation? A. Yes, I did. We happened to be—Mr. Pierce and I happened to be in Washington on the 1974 Consent Decree business. We had a discussion with Mr. Gerald George about the fact that it was inevitable that we were going to be laying off people. And there was discussion about that. We highlighted the principles of the layoff policy as it was, and the stage was designed at that time.

Q. Did you inform Mr. George that the layoffs were contemplated on the basis of city-wide seniority? A. Yes, I did.

Q. Did Mr. George, on behalf of the Justice Department, pose any objections to the contemplated layoffs? [43] A. He did not.

MR. FIELDS: Objection, Your Honor. Mr. George isn't here, it's hearsay.

THE COURT: Well, I think he can ask whether he objected, but he can't go into the specifics of the conversation.

(By the Witness)

A. As I best recall, he did not object.

Q. Now, we have talked only about the fire division so far, Mr. Sabatini. Are there also layoffs contemplated within other divisions of the City? A. There currently are layoffs contemplated in all twelve of the twelve major divisions of the City.

Q. Is there any division without regard to the size of your current employee complement of those divisions, is there any other division that has as many employees being forecast for layoff as does the fire division? A. Per

my current calculations, the Park Commission will in fact, are scheduled to reduce by fifty-five positions, which is the same as we are currently estimating in fire fighting.

[44] MR. LEWIS: May I have just a moment to confer with counsel, Your Honor?

THE COURT: Yes.

(Counsel conferring.)

Q. (By Mr. Lewis) Mr. Sabatini, you have given us the overall approximate status of the fire division, now, with regard to percentage of black employees as eleven percent. Given the fact that you have made forecast of reductions within that department, do you know what would be the result, if your forecast were accurate, as to the results of the layoff with regard to the percentage of black employees in the department once the layoffs have been completed? A. A reduction of one percent based on current calculations.

Q. Do you know how many layoffs are contemplated city wide—and let me rephrase that question, if I may. How many positions are contemplated as being abolished by the administration as part of the current year's budget? A. It is right at one thousand positions. I think nine hundred and ninety-eight, I believe, total positions.

Q. Does that include CETA positions, as well as those paid out of general city funds? [45] A. It includes CETA, it includes part-time. It includes the abolishment or elimination of currently vacant positions, and it includes the layoff of approximately two hundred and twenty people.

Q. I am going to take you step by step to where you got, if I may.

How many positions are either frozen or contemplated for layoff with regard to the beginning of the next fiscal year city wide. And when I say frozen, I mean currently there is a position there, but there is no one in it and that

position is to be eliminated? A. That figure is approximately—it is between two fifty and three hundred.

Q. All right.

You are speaking when you say two fifty and three hundred, of the number of positions that are authorized but not filled? A. That's correct.

Q. And you have already given us the number of approximately two hundred and twenty persons, city wide, that will be laid off according to the forecast? A. Those are positions that also have been abolished or eliminated in which there are employees.

Q. So, if I add those two numbers correct, as a [46] result of the reductions in the current budget, there are approximately four hundred and fifty positions, city wide, to be eliminated. A. Those are positions that are city funded positions, yes.

Q. And how many of those positions are to be eliminated from the fire division? A. I believe the figure is fifty-five.

Q. Now, that is the number that are currently filled, though? A. Yes.

Q. Okay. If you add to that the number of positions that are frozen with no one there that are to be abolished, do you know what that number would be? A. I do not recall that number, no.

Q. Okay. A. I do know that there are a significant number of vacancies that had been eliminated in the fire division, but I do not recall the numbers.

MR. LEWIS: I believe that's all, Your Honor.

MR. FIELDS: I have some questions.

THE COURT: Well, maybe Mr. Blair. Do you want to ask some [47] questions, Mr. Blair?

MR. BLAIR: It will be three questions, if Your Honor please.

THE COURT: All right.

We'll see.

(Laughter.)

MR. BLAIR: I beg your pardon, I didn't hear the Court?

THE COURT: I said we'll see if it's just three.

(Mr. Blair conferring with Mr. Lewis.)

THE COURT: That's one of them you just used up.

(Laughter.)

[48] Cross Examination

By Mr. Blair:

Q. Is the Fire Fighters Local Union No. 1784 the sole recognized collective bargaining representative of employees in the fire services division? A. It is.

Q. I would like to pass to you, and see if you can identify for the record, a copy of the 1975 memorandum of understanding and the 1978 memorandum of understanding.

(Thereupon, the above described document was passed to the witness.)

MR. FIELDS: No objection.

MR. LEWIS: No objection.

A. Yes, I can testify to this.

MR. BLAIR: If Your Honor please, I believe the last marked exhibit was No. 3.

(Clerk nodding negatively.)

MR. BLAIR: No.

THE CLERK: Four.

MR. BLAIR: Four.

I would move the 1975 contract, or whether memorandum of understanding, be admitted as Exhibit 5.

[49] THE COURT: All right.

(Thereupon, the above described document was marked as Hearing Exhibit No. 5, and the same will be found among the exhibits in the cause.)

MR. BLAIR: And the 1978 agreement be admitted as Exhibit 6.

THE COURT: All right.

(Thereupon, the above described document was marked as Hearing Exhibit No. 6, and the same will be found among the exhibits in the cause.)

MR. BLAIR: Just one moment, if Your Honor please.

(Counsel conferring.)

MR. BLAIR: That's all. That was two questions.

THE COURT: All right.

You did well, Mr. Blair.

All right. Now, do you have anymore?

MR. FIELDS: I have some redirect, Your Honor.

[50] Redirect Examination

By Mr. Fields:

Q. Now, Mr. Sabatini, you testified from examination by your counsel that forty-six percent of the hires in '74 have been black; is that correct? A. Again, there are two figures. And I believe the two are distinctly different.

Q. Forty-six, and without rehires, fifty-six? A. That's correct.

Q. Okay.

Now, we haven't done that very easily, have we Mr. Sabatini?

THE COURT: Is it with rehires or without rehires?

MR. FIELDS: Without rehires it is fifty-six percent.

THE COURT: All right.

MR. FIELDS: Rehires, you understand, men that have went off and came back on.

THE COURT: All right.

Q. (By Mr. Fields) We haven't done that very easily, have we, Mr. Sabatini? A. I think we have.

Q. All right.

[51] Have we done that in the administrative office, how many blacks have been hired there? A. Wait a minute. Are you talking about the Consent Decree?

Q. I am talking about in 1974, how many blacks have been in the administration office of the Fire Department? A. I do not recall any blacks.

Q. In fact, it was only recently that outside of fire fighting you began to hire blacks in any proportionate numbers; isn't that correct? A. That does not strike me as being anything that has happened recently.

Q. In the fire alarm office you have been hiring at the fifty percent level all of the time? A. I cannot concur with that or differ with it, I am not aware.

Q. In the maintenance shop you have been hiring at the fifty percent level all of the time? A. Again, the same response.

Q. In fact, you have never hired a maintenance mechanic—a black maintenance mechanic in the maintenance shop? A. I believe that I was referring to the performance against the '74 Consent Decree, which in my opinion [52] reflects approximately fifty-six percent black being hired against that. My reference is totally to the '74 Consent Decree.

Q. Well, let's go to just before the '74 Consent Decree. Are you aware of what the Fire Department's hiring policies were in terms of black? A. I'm not aware.

Q. Excuse me? A. I am not aware.

Q. All right.

I would like to show you and mark as an exhibit—

MR. LEWIS: (Interjecting) Your Honor, I am going to object to any matters being introduced that precede

the 1974 Consent Decree. That matter has been litigated both with that, and presumably the second Consent Decree. And for us to reopen those matters that have been settled twice, just doesn't seem to bear any relevance.

MR. FIELDS: Your Honor, the purpose of this. This is a document that is in this case, in one of the [53] pleadings, I believe in my response to a Motion for a Summary Judgment in December of 1979.

This is a list of the hiring in the Fire Department since 1950. The purpose for which it is introduced is to show what effect a seniority system has in the Fire Department if he used city wide seniority, and how blacks have been—

THE COURT: All right. I overrule the objection.

MR. FIELDS: Thank you.

Q. (By Mr. Fields) Mr. Sabatini, I would like to show you this, marked as Exhibit 7.

(Thereupon, the above described document was marked as Hearing Exhibit No. 7, and the same will be found among the exhibits in the cause.)

MR. LEWIS: Your Honor, we are prepared to stipulate to what Mr. Fields says he is trying to prove, and that is the effect of seniority. We have given the numbers, I don't know what more there is to prove.

[54] THE COURT: I don't know what you are prepared to stipulate.

MR. LEWIS: We would stipulate to those figures that Mr. Sabatini has already testified to with regard to what would be the effect, who will be laid off as a result of the application of seniority.

MR. FIELDS: Your Honor, that is fine to stipulate to. But, we are talking, we have some numbers we know right now are going to happen. Other numbers in the future may happen, as well, and I want to get into that with Mr. Sabatini. If they continue to use the city-wide se-

niority policy, and there are no layoffs and more demotions, how that is going to affect the blacks.

THE COURT: All right.

MR. BLAIR: If Your Honor please, I would just like the record to reflect that we join in the objection.

THE COURT: All right.

[55] I overrule the objection.

Q. (By Mr. Fields) All right.

Mr. Sabatini, I would like for you to look at that list. It is pretty dismal, isn't it, in terms of hiring blacks?

MR. LEWIS: We object to the form of the question, Your Honor.

THE COURT: Yes. I sustain the objection.

MR. FIELDS: I'm sorry, Your Honor.

THE COURT: Let's make it factual and not dismal, and things like that.

MR. FIELDS: All right.

Q. (By Mr. Fields) Doesn't it show there, Mr. Sabatini, that until 1977, there were very few, if any, blacks hired by the Memphis Fire Department? A. It reflects very few.

Q. All right.

In fact, between 1955 and the early 60's, there were no blacks hired; is that correct? A. According to the list, yes.

Q. Okay. And prior to 1955, there were no blacks [56] hired? A. According to the list, that's correct.

Q. All right.

Now, we talked about this one percent change that will happen if you just do these layoffs right now. But, if you continue to layoff, won't that percentage increase geometrically because most of your blacks have come on the department in recent years, and it won't affect as many whites? A. In recent years, as I think we indicated, since '74 it has been pretty even figure coming on

to the department, in fact. The percentage has been five percent in favor of blacks coming on to the department. So, it is somewhat even.

Q. Well, but your goal was fifty percent anyway? A. Yes.

Q. Under that Consent Decree, as well as this Consent Decree; right? A. That's correct.

Q. And really, you didn't start hiring a substantial number of blacks until 1977? A. That is an incorrect assumption, we didn't have a class. We had no class in the early years of the Consent Decree.

Q. Well, that is how you hire in the uniform ranks, [57] is through classes? A. It's by class, yes.

Q. Okay.

But you didn't have a class until '77—I mean, until '77? A. I believe it was '77.

Q. All right.

Now, you also had some problems with promotions during this period of time; did you not? I am specifically talking about the fire prevention bureau in 1976? A. Yes, there was a problem with the fire promotions.

Q. What happened then? A. It is my opinion that there was a reorganization of the fire prevention bureau, and additional slots were identified that were promotion slots, that when we reviewed that material in-house, as well as in my opinion, the Justice Department, we concentrated on looking at the filling of the open positions that were fairly newly created, but because of the reorganization, and therefore I failed to identify what I would refer to as the domino effect; and that is if a lieutenant is promoted to an investigator in fire prevention, then there needs to be a lieutenant promotion in fire [58] fighting. That being an example of the domino effect.

In my opinion, that is what occurred.

Q. Now, come on, Mr. Sabatini, wasn't it in fact that you forgot to tell the Justice Department about the promotion to the fire prevention bureau? A. No, I believe it has been our position, even with him, that we did in fact tell him.

Q. All right.

Could I show you a copy of the letter that he sent to you. Are you aware of this letter? A. I think so.

Q. And what was his position? A. You'll have to show me the letter.

Q. All right.

(Thereupon, the above described letter was shown to the witness.)

A. I think the letter also indicates what our position is.

Q. Which is? A. And that is, that in the reorganization of the fire prevention bureau, we failed to identify what the domino effect would be. And we have admitted to that, but at the same time we feel—Director Walker and myself both feel, that there was some notification at some point in time given to the Justice Department about [59] these promotions and the domino effect.

We failed to take it into consideration in our reporting and in our calculations as to the '74 Consent Decree. And we admit that.

Q. All right. But you don't agree with this statement, then, by Mr. George? It is attached to Exhibit 5 to Plaintiff's response to a Motion for Summary Judgment, filed October 31, 1979 in this cause.

(Reading.)

"Regarding the Fred Jones Complaint, I am concerned by the paragraph on page two of your letter of October 18, 1976, to Mr. Jones, which implies that the Justice Department approves the 1976 promotions in the Fire Department.

vention and administration, that would be abolished or laid off? A. I think there are five or six bureaus which are being affected, in addition—including fire fighting.

Q. Do you know the number of blacks who will be affected by those? A. No, I don't.

Q. Would it be safe to assume that there would be blacks in those, since you have just recently hired blacks in each of those areas? A. I think it would be a premature assumption because [62] of the number of positions affected in those bureaus. It is conceivable that come the 27th of June, no one will be laid off.

Q. How would that happen? A. Through attrition.

Q. All right. A. The same way in the fire division figures—the fire fighting figures.

Q. You mean there may be a possibility there may be no layoffs in fire fighting? A. I can't say that, but the figure is continuously changing by result of attrition.

If the position being abolished or eliminated that has a person in it, and there is a person in that same classification that resigns, or is terminated, or retires, that abolished position will in fact be eliminated, but that employee could be employed in the current position.

Q. All right.

Now, you said there are fifty-five positions affected by layoffs in the Fire Department. That doesn't include the positions affected by demotions, does it? A. I have no idea what you mean by demotions.

Q. Exhibit 2 is a list that I was provided by the [63] Fire Department. Are you familiar with that list? A. Yes.

Q. Is that a correct list of the employees? A. I believe it is for fire fighting, yes.

Q. All right.

Now, from that list, you are not talking about the fifty-five slots when you are looking at that list. The

As you know, what I approved was what I was led to believe was a group of about thirty-five to thirty-seven promotions, seven of which went to blacks. The actual number of promotions in 1976, as was only very recently discovered, was over ninety. As I wasn't aware of the actual number of promotions, I can't be said to approve [60] them. Moreover, if I had been aware of the number of anticipated promotions, including the number which were offered to black fire fighters, I would not have approved them."

But, it is your opinion that he was notified of those promotions? A. No, I did not say that. I said that Director Walker and I both recall some discussion was had.

MR. LEWIS: May I be allowed to see the letter?

MR. FIELDS: Oh, I'm sorry.

MR. LEWIS: I think in the future if counsel is going to read documents, we would like to see them too.

THE COURT: Let's move along.

MR. FIELDS: Yes, sir, I am prepared to do that.

Q. (By Mr. Fields) Now, Mr. Sabatini, are you aware that one of the reasons that the number of blacks were promoted under the Consent Decree in the Fire Prevention Bureau in 1979 was because of this omission in 1976? A. Yes.

[61] Q. All right. And if they had been promoted in 1976, they would have gotten those seniority dates, then; is that correct? A. That would be correct, yes.

Q. All right, thank you.

Now, you said that there were going to be— A. (Interjecting) I think on second thought, Mr. Fields. I believe the word—did you say omission or admission?

Q. Omission. A. Yes, sir.

Q. Okay.

Now, you said that there are also going to be positions in the alarm office, apparatus and maintenance fire pre-

fifty-five slots you are talking about are the actual layoff of personnel. If these people all chose to be bumped, that would be in addition to the fifty-five layoffs. So, the number of people effected by your policy is not just fifty-five in the Fire Department, it is at least that list plus fifty-five? A. You would have to clarify what you mean by layoff.

Q. Well, people that would be out of a job on June 26th? A. No, they would not be in addition—fifty-five in addition to this list.

Q. How many— A. (Interjecting) Fifty-five positions are being abolished or eliminated in which there are current employees. Those employees will have bumping privileges, some may take retirement, which would reduce the figure even more.

[64] Q. Okay.

Take my assumption, first. Fifty-five positions are affected. Those people can bump down, and they keep bumping until somebody is out of a job; right? A. That's correct.

Q. So, you have what you call the domino effect? A. That's correct.

Q. So, it is not just fifty-five employees that are going to be affected, it is much more because employees then will be bumped, and eventually employees then would be laid off.

I am talking about the numbers of employees affected; do you see what I am saying now? A. Yes.

Q. That is greater than fifty-five. A. As it relates to just those employees that would be laid off in terms of being out of a job. In fire fighting it is approximately forty, and I believe that twenty-five of those are white and fifteen are black.

Q. I understand that. That is out of a job. But in terms of the numbers being demoted, those aren't the numbers? A. They are not being demoted.

Q. No, I understand that. But they are not being laid off unless they choose to be laid off? [65] A. They have options available.

Q. Okay.

It is pretty obvious the option that they would take if they want to continue in their job, to be bumped back down to a lower position? A. Exercise their bumping benefits, yes, sir.

Q. Okay.

Are you talking about—now, those people are not going to be laid off, if they choose not to? A. That's correct.

Q. But if a lieutenant bumped down to a driver, then a driver bumps down to a private, then a private is going to get laid off, not that lieutenant or that driver? A. That's correct.

Q. All right.

That's all I have for Mr. Sabatini.

MR. FIELDS: Your Honor, I would like to move for the admission of Exhibit 1, 2, 3, and 7.

THE COURT: Well, I consider they are in.

MR. FIELDS: All right, sir.

THE COURT: All exhibits that had been offered, that I haven't [66] sustained an objection to, are in.

MR. FIELDS: Okay.

THE COURT: Now, are there any more questions of this witness?

MR. LEWIS: Yes, Your Honor, I have a few.

Recross Examination

By Mr. Lewis:

Q. Mr. Sabatini, I am just going to try to clarify a few things. What do you mean when you say that there was no class prior to '77, and for that reason there were no opportunities to hire persons? A. The '74 Consent

Decree requires us, basically, to hire fifty percent, if qualified, a fifty percent ratio.

And during the early years of the Consent Decree, there was not a new class hired into the Fire Fighting Bureau. That is the only way that we bring in new employees into fire fighting, other than rehires, which has other conditions.

[67] Q. So that 1977 would have been your first opportunity to hire a new employee because that was your first class? A. Yes, that's correct.

Q. With regard to whether someone who may have been promoted late would thereby be affected in terms of layoff, what is the basis on which the City is planning the layoffs? A. I'm not sure I understand your question.

Q. City-wide seniority is the basis for the policy; is it not? A. Yes.

Q. Would that city-wide seniority began when the individual was hired, or when he was subsequently promoted? A. It begins when the individual is hired.

Q. So that if someone was actually promoted in 1978, rather than 1976, would that effect him in terms of his ultimate layoff? A. Not in terms of his ultimate layoff because of his city-wide seniority.

Q. Now, are all fifty-five persons that are contemplated to be effected by the layoffs in the Fire Department, or division, lieutenants who will all bump back, or are there also other classifications of employees [68] effected? A. There are other classifications.

Q. All right.

Do those include privates? A. I believe so. I believe there are—yes. Wait a minute, I think it is sixteen or seventeen privates.

Q. So, those persons would not require any dominos to follow? A. No.

Q. What were the numbers, again, that you gave with regard to the actual forecast of those persons hitting the street as a result of the layoff? A. Approximately forty, twenty-five of which would be—excuse me.

Q. Forty fire fighters or division wide? A. Forty fire fighters. Approximately forty fire fighters that would be in the streets.

Q. How many of those fire fighters hitting the streets would be white? A. Twenty-five.

Q. How many black? A. Fifteen, based on current calculations.

Q. Do you know with regard to the other persons in the division, how many whites and blacks would be laid off? [69] A. I do not recall.

Q. Now, Mr. Fields gave you some information, apparently, with regard to a fellow with the Justice Department in 1976. Do you know what the current attitude of the Justice Department is toward the City of Memphis under their Consent Decree?

MR. FIELDS: Your Honor, that is a little beyond. He can just ask him if he had any objection.

THE COURT: Yeah, I have to—what is it that you wanted to ask him?

MR. LEWIS: Your Honor, Mr. Fields introduced a letter back in '76 complaining about something. I intend to introduce a current proposed Consent Decree, wherein the Justice Department specifically recognizes, "Significant affirmative action progress" on behalf of the City since the last—

THE COURT: (Interjecting) Well, all right. Let me say that at the time I think we got pretty far afield with that letter. It was [70] not introduced.

And the contents of it were brought into the record by Mr. Fields incorporating it in a question and asking the witness whether he agreed with it. And I regret that we

got that far involved. I think its topic might have been pertinent, but we certainly didn't need to go into the whys and wherefores of the Justice Department being advised.

The witness acknowledged that something had not been taken into consideration. And I am not really interested in the backing and filling that went on at the time.

I sustain the objection to the question that you just asked because I think that both sides could get into some good guys and bad guys opinions, you know. And I don't want to do that.

MR. LEWIS: May I have just a moment, please?

THE COURT: Certainly.

(Counsel conferring.)

[71] MR. LEWIS: That's all the questions we have.

THE COURT: Mr. Blair?

MR. BLAIR: No questions, Your Honor.

THE COURT: All right.

Let me ask some questions.

Have you still got Exhibit 2 up there?

THE WITNESS: Yes, sir.

THE COURT: What do you consider that to be?

THE WITNESS: It appears to be a list. For instance, I call your attention to the lieutenant and driver list.

THE COURT: Yes.

THE WITNESS: It appears to be a list of individuals whose positions have been abolished or eliminated by virtue of the budget who have a bumping right back to the driver's position.

THE COURT: All right.

Now, do you know who compiled that?

[72] THE WITNESS: I understand from Mr. Fields that this was compiled by the fire division.

THE COURT: Well, has anybody made a study that would trace the probable effect when a lieutenant is bumped to driver, and a driver is bumped to a private?

THE WITNESS: The City is in the process of trying—because of this particular incident—of trying to project what the ultimate result is. And at this point in time, I do not have access to that information. I am not familiar with it. I'm not sure that it has been completely developed.

THE COURT: Now, the estimate, or the testimony that you gave that follows the line that there are approximately forty people who would be laid off, twenty-five white and fifteen black, are those all privates?

THE WITNESS: Yes, sir.

THE COURT: And where did that information come from?

[73] THE WITNESS: We estimated the number of positions that would ultimately result in a layoff to the street, if I may use that term. And counting up the youngest private, from the list of the youngest private we were looking at approximately—after looking at the last few classes, we were looking at, if it were forty positions, it would be approximately twenty-five whites, fifteen blacks.

THE COURT: Is that based on an assumption that the people higher in rank would bump?

THE WITNESS: Yes, sir.

THE COURT: And ultimately all privates would—

THE WITNESS: (Interjecting) A very sketchy assumption. I was just attempting to calculate what the bumping effect would have with a private.

THE COURT: And did I understand you correctly when I understood you to say that a study is now being made to determine the overall effect, I guess [74] of the domino procedure; is that what is being done?

THE WITNESS: That's correct. Again, it is a very difficult process because the figures are changing based on attrition and other factors.

THE COURT: Well, all right.

Now, does city-wide seniority mean that if somebody in the Fire Department used to work in the Sanita-

tion Department, that his date of hire in the Sanitation Department would be his city-wide seniority date?

THE WITNESS: That's correct.

THE COURT: Do you know, realistically, whether there is any real difference for the Fire Department personnel, or do we have many people in the Fire Department who came from other departments?

THE WITNESS: In fire fighting, Your Honor, I would say that it is not a significant number.

THE COURT: Those people are trained to be fire fighters, and there [75] is probably Fire Department seniority; is that correct?

THE WITNESS: It is not true in all cases. I am familiar with some City employees who had other classification seniority, and applied for and was accepted to the Fire Department.

THE COURT: But you wouldn't think it was a large number?

THE WITNESS: No.

THE COURT: All right. Thank you, sir.

All right. You can step down.

(Witness excused.)

THE COURT: Now, do we have more proof?

MR. FIELDS: Your Honor, I had planned to call Director Walker, but I think that everything has been covered, and I have no more witnesses.

THE COURT: I didn't understand you.

MR. FIELDS: I was planning to call Director Walker, but I think [76] everything has been covered with these witnesses and I have no further proof.

THE COURT: All right.

Does the City want to—do you have proof, Mr. Lewis?

MR. LEWIS: Your Honor, we will call Director Walker for about two questions. I say that advisedly.

[77] DIRECTOR WALKER,

the said witness, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lewis:

Q. Director Walker, you are the Director of the fire division? A. That's correct.

Q. When I asked Mr. Sabbatini if he knew the numbers of blacks and numbers of white who are not in the Fire Fighting Bureau who would be laid off under the current City forecast, he did not know. Do you know those numbers? A. I believe there are twelve additional people that are not in the Fire Fighting Bureau who will be affected by the layoff.

Q. How many of those are black persons, and how many of those are white persons, according to our forecast? A. Seven are white and five are black.

MR. LEWIS: That's all I have, Your Honor.

[78] Cross Examination

By Mr. Fields:

Q. Director Walker, you said an additional twelve employees, that those positions would be abolished? A. That's correct.

Q. All right.

Did you consider any other method rather than layoff of your personnel, for example, reduction in hours? A. No, we have not considered that at this time.

Q. Are you considering it? A. Well, we will be looking anyway possible, but at this time we have not considered anything else other than the city-wide seniority.

Q. Okay.

Now, Mr. Sabatini said that there was some kind of study being done. Are you doing a study now about what the overall effect would be on blacks in your department? A. No, sir. I know that there are some figures being generated, but I don't know what they are at this time.

Q. But you are not in charge of that? A. No, sir.

Q. Thank you.

[79] THE COURT: Where are these twelve people. I don't mean everyone of them.

THE WITNESS: Okay. Basically, there are three in the fire apparatus maintenance. There are four people in the fire alarm office. There are some people in the Fire Prevention Bureau. And I believe those are the major ones that make up the twelve.

THE COURT: Do they have rank?

THE WITNESS: Yes, sir. They have rank in their own bureau.

Now, the Fire Prevention Bureau essentially comes from the fire fighting to begin with, with some exceptions. We do have some City employees in there who are both fire and safety representatives. They are civilian employees, but most of them are promoted from the ranks of fire fighters, fire inspectors.

THE COURT: Do they have some bumping privileges?

THE WITNESS: Yes, sir. The [80] fire investigators, for example, would have the privilege to bump the fire inspectors. The fire inspectors not having previous service in the fire fighting, would have the right to bump the fire private.

THE COURT: You don't really expect a lot of people to retire between now and June 26th, do you, sir?

THE WITNESS: I believe that is a loaded question.

THE COURT: You are not considering it, are you?

THE WITNESS: I know that's a loaded question. (Laughter.)

THE COURT: All right. Forgive me, I shouldn't have said that.

THE WITNESS: Let me answer by saying that since January, 1978, we have had eighty people, from the ranks of lieutenant and above, to retire. So, anytime that a lieutenant or above retires, that means there is an opening for a lieutenant, which is the bottom of [81] the career ladder in the fire fighters.

So, if a deputy chief leaves, for example, then a promotion would be made for a deputy chief from the ranks of district chief. The district chief would be promoted to the ranks of captain, and so on down the line.

So, each time a ranking officer leaves, this opens a position for a lieutenant.

THE COURT: At this meeting that was scheduled for Tuesday, I understood that some discussion was going to be had about retirement. Is there any incentive being offered like early retirement, or anything along those lines, in view of the necessity for layoffs?

THE WITNESS: We have talked in general terms about some other incentive, but we have not developed any at this point.

We were merely calling these people to notify them of their rights, of their bumping rights and their [82] privileges because their job was being deleted.

You see, what brought this about was the seven fire fighting companies being put out of service. When you put companies out of service, this represents fifteen men, or inspectors. And these are from the ranks of captain, lieutenant, driver, and private.

THE COURT: All right. Thank you, sir.

(Witness excused.)

THE COURT: All right. Do you have other proof, Mr. Lewis?

MR. LEWIS: We have one final witness, I believe, Your Honor. Mr. Mosby.

THE COURT: All right.

[83] MARLIN L. MOSBY, JR.,

the said witness, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lewis:

Q. For the record, please, sir, would you state your name and position with the City of Memphis? A. Marlin L. Mosby, Jr., Director of Financial Administration.

Q. And I presume that in your position as Director of Finance and Administration, you are the numbers man for the City of Memphis? A. That title has been—I have been referred to that way, yes, sir.

Q. Mr. Mosby, without getting into it in any long degree, because I think everyone in the Courtroom appreciates the financial condition of the City of Memphis. What is the reason that we are now contemplating layoffs?

MR. FIELDS: Excuse me, Your Honor. I don't know if this will be repetitive or not, but I think we have agreed that there is a need—a financial need in the City. If this is just more of that, I don't [84] know if it is necessary evidence.

MR. LEWIS: If that is in the nature of a stipulation, we accept it. I will skip over the proof on that.

THE COURT: All right.

As far as the Court is concerned, I want to make it plain that I don't consider it an issue in the hearing.

Now, I don't mean for anybody to think that this Court has made a finding on the need. And I know that has got to be a right controversial topic. And there are going to undoubtedly be some other groups that are going to—the City Council, for example, is going to have to really face up to this.

The stipulation is fine, but I do not want the record, or anybody, to think that the Court has held yea or nay on the need. That is a job for the city officials and not me.

But I agree that it is not an issue in this hearing.

[85] Q. (By Mr. Lewis) Mr. Mosby, were you involved in the budget discussions that resulted in the decision that layoffs would have to be made? A. Yes, sir.

Q. And I am going to sum that up, if I may, by saying that I assume the reason for that is that the projected revenues did not meet the projected expenses? A. Yes, sir, there were some—in the operating budget alone, there were some twenty-nine million dollar discrepancy between expenditures and revenues in money flow.

Q. Do you know what percentage of the overall operating budget of the city is made up from the fire division's budget? A. Twenty-seven percent, I believe—twenty-three point two percent.

Q. Do you know what percent of the overall City worked for, paid by the City out of general funds, is composed of Fire Department—fire division employees? A. Approximately the same number, it is right at twenty-two percent.

Q. We have already heard testimony on the fact that all divisions were effected. I don't want to reiterate that, but there is some suggestion, at least as I understand this case, that perhaps the Fire Department should [86] be exempted from those layoffs. If I am incorrect in that understanding, I won't proceed.

MR. FIELDS: Your Honor, I have never said that, and I don't know by whom it is being suggested.

THE COURT: Well, I don't consider that as being raised in the pleadings or any of the matters for this hearing.

I will say this. If somebody determines that there are not going to be any layoffs, we don't have any problem.

(Laughter.)

MR. LEWIS: I can assure you we wouldn't be here, if we were cocky about that.

Q. (By Mr. Lewis) Mr. Mosby, in this budget making projection, and we are, of course, particularly concerned with the Fire Department, what is the method that is utilized by the City? A. To develop the budget? The process is one that centers around service level. We have developed a budget process known as the alternative service level budget.

[87] We first develop a maintenance level budget, as the Mayor has said before. And then we develop alternative service levels. If you change your funding, how you would reduce your service so much per level of funding. Those different levels are submitted from the directors and reviewed by the City, and ultimately the Mayor makes the decision, based one, on the level of funding and the level of revenue available. And then we prioritise all of our service levels, and we pick those levels that are the highest priority to fund to the point that we have used all of the money.

Q. The Judge probably understands that, but I don't. A. I'm sorry.

THE COURT: I don't understand about prioritise.

Q. (By Mr. Lewis) That is what I would like for you to explain. A. In the fire division there are some, let's say six or seven activities, different things; fire fighting, fire prevention. And for each of those activities

we will develop several budgets that represent different levels of service. And then we will rank them, literally, this is our highest priority item. This is our next highest priority item, and our [88] next highest priority item, bi-level of service.

In fire fighting, in our impression, if the lowest level of service is the highest priority. And then you just come down, and you keep adding levels of service in the order of their priority or ranking. That is developed first by the division, and then it is reviewed by the Mayor, and finally arranged and presented to the Council.

So, we actually present levels of service ranked.

Q. As I understand it, if I were the fire director, or what was actually done in this case by Director Walker, was that he decided that there would be twenty-five different activities at the Fire Department that he would like ideally, to see funded? A. Yes, sir.

Q. If he had all of the money that he could spend, that is what he would do? A. Yes, sir.

Q. And then when he got into the budgeting process, he was given to understand that the City did not have all of the money, and as a result of that, some of these desirable, perhaps, activities, would have to be eliminated? A. That is correct. In his particular case there were twenty-five levels of service that he presented, [89] and they were ranked one through twenty-five.

Q. Now, how did we get to layoffs of individuals in the fire division? Was that done by picking out this person, or that person, or the next person, or was it done by eliminating some whole activity that Director Walker had on his list?

MR. FIELDS: Your Honor, I don't mind giving the information, but it is a little leading.

MR. LEWIS: It sure shortens it.

THE COURT: Get him to nod, at least.

(Laughter.)

(By the Witness)

A. It is by level of service.

Q. Okay. And when you say a level of service, again, what is it that you are referring to? A. Yeah, let me explain. In fire fighting, it may help to describe the process we went through in that particular case.

The decision was made in fire fighting, basically, that we did not want to close companies or close stations, but that we had to cut back. And we identified that there were seven companies in the City that could be [90] eliminated before we would close a station.

So, one level of service that was provided was to eliminate those seven companies. Another level of service below that was actually to eliminate five more companies, which would have closed three stations. We ranked those. The ranking was such that closing stations had a higher priority and was funded. Not funding companies, seven companies, was of a lower priority and was not funded.

So, we identified companies. The impact that those companies would have on the level of service. That was presented as a level of service. In this particular case there were actually two of them, two at different levels. And then they were not funded.

Q. All right.

So, when you did away with seven companies, you did away with X number of positions; is that correct? A. Not only the position, you did away with the fuel cost associated with that. You did away with any capital expenditures that might have been associated with it, utilities. It was looked at as a unit, as all of the cost that were associated with that unit are presented in line.

Q. So, that when we are speaking of layoff, it affects the City budget not only in terms of the [91] individuals who might ultimately be laid off, but also the equipment that they used, the gas that they would utilize over the course of the year, and so forth. A. Exactly, and then those are all included together.

Q. And it was on that basis that it was determined that the various positions would be eliminated? A. That is correct.

MR. LEWIS: That's all.

THE COURT: All right.

Mr. Fields?

MR. FIELDS: No questions, Your Honor.

MR. BLAIR: No questions, Your Honor.

THE COURT: All right. Thank you, sir.

(Witness excused.)

THE COURT: Any more proof from the City?

MR. LEWIS: No, Your Honor.

THE COURT: Mr. Blair, do you intend to offer any proof?

MR. BLAIR: No, Your Honor.

THE COURT: All right.

What I would like to do is take [92] a short break. We sent word for the air conditioning people, and the man just came in back there and left. I wish I had stopped him and enjoined him to do something.

(Laughter.)

THE COURT: The cooling over here is not very good, but when you bring this many people in, it gets worse. And I am sorry, but with all of the authority I have, I don't have the authority to keep the place cool.

But I do think that we ought to break up for about five minutes. This is a large crowd. And then I want to come back and I want counsel to present their arguments.

I will say that I have not had an opportunity to familiarize myself with all of the briefs. So, I am not restricting you. At the same time, I don't want repetition. But some of these things were filed very late and there is quite a bit to cover for a [93] short notice.

So, let's take just about five minutes, Ginny.

THE COURT: All right.

(Recess.)

You may proceed, Mr. Fields.

(Closing argument of counsel.)

THE COURT: All right.

I'm going to announce my findings orally at this time and ask that proposed findings be drafted and available for me when I return to the City a week from tomorrow.

(Oral ruling of Court.)

THE COURT: Anything else?

(No response.)

THE COURT: Mrs. LaFon, you may adjourn Court.

(Adjournment.)

CERTIFICATE

I, Sharlyn A. Phillips, do hereby certify that the foregoing ninety-three (93) pages, to the best of my knowledge, skill and ability, are a true and correct transcript of the proceedings on May 8, 1981, at Memphis, Tennessee.

/s/ Sharlyn A. Phillips
Sharlyn A. Phillips
Notary Public at Large
For the State of Tennessee

This 18th day of May, 1981.

My Commission Expires:
February 23, 1983.

HEARING EXHIBIT 1

CITY OF MEMPHIS

INTER-OFFICE
MEMORANDUM

TO: CITY EMPLOYEES

DATE: May 4, 1981

FROM: Joseph D. Sabatini
Director of Personnel

SUBJECT: Layoff Policy

Attached is a copy of the City of Memphis Layoff Policy. The purpose of this policy is to provide uniform guidelines to follow when a layoff of City employees becomes necessary.

The Layoff Policy was promulgated by the Director of Personnel, reviewed and approved by the Mayor, the Chief Administrative Officer, and the Division Directors of the City of Memphis. This policy has also been reviewed and approved by the Memphis City Council Personnel Committee and will be a part of the rules and regulations of the City of Memphis.

We regret that an action of this type is necessary but, in our opinion, the guidelines incorporated in the attached policy will ensure an orderly and fair process of layoff.

/s/ Joe D. Sabatini

es
Attachment

I, ..., (please print full name) the undersigned, an employee of the City of Memphis, do hereby acknowledge receipt of the City of Memphis Layoff Policy on this date.

.....

Employee's signature

.....

Date

.....

Social Security Number

(Return to Employee Services Bureau, Personnel Division)

April 29, 1981

CITY OF MEMPHIS
LAYOFF POLICY

POLICY STATEMENT

A layoff shall be defined as an interruption of continuous employment, without prejudice to an employee, caused by a reduction in the work force due to a reduction in operational funding levels, lack of work or other changes in conditions, functions, or organization of City Government. In order to provide a level of service to the citizens of Memphis, a layoff will not occur unless deemed appropriate by the Mayor.

The Mayor has the sole authority to determine those classifications, their locations and the number of positions within that classification that are to be abolished, reduced or frozen.

Once the Mayor determines that conditions exist necessitating a layoff, the Mayor shall appoint a Layoff Committee to administer this layoff policy. The Committee shall be chaired by the Director of Personnel or his designee and shall be made up of four City Division Directors and/or their designees. In any dispute or interpretation regarding this layoff policy, the Layoff Committee shall review and make recommendations for settlement to the Chief Administrative Officer whose decision will be final.

If there is a conflict or inconsistency between the provisions of this policy and federal, state, local mandates or laws, or provisions of existing Memoranda of Understanding, the discrepancy shall be reviewed by the Layoff Committee and a recommendation made to the CAO for final disposition.

In the event that a layoff should become necessary, the following guidelines herein described shall prevail unless amended by the Mayor.

PROCEDURE

The Layoff Committee shall observe the following guidelines:

1. When a layoff occurs, requests for voluntary layoff within the affected classifications and from the appropriate work unit will be considered and granted at the discretion of the appropriate Division Director. Employees who volunteer to take layoff shall not be eligible for involuntary retirement benefits, but will be eligible for unemployment compensation benefits.
2. When practical, employees shall be given thirty (30) calendar days notice prior to being laid off.

3. Seniority Determination

A. Layoffs shall occur within a classification, based upon city-wide seniority which shall be determined on the basis of actual date of continuous service from the latest date of permanent employment. Based upon city policy and recorded documentation and approval that accepts seniority credit at the time of transfer from other specific governmental agencies, that seniority shall be included in the determination of the employee's city-wide seniority. Upon completion of the initial probationary certification in a city-funded position, all continuous CETA/PSE and other grant time shall be in the calculation of employee's city-wide seniority, provided the employee has obtained permanent status in a city-funded position.

B. When an employee's position in a given classification is abolished or eliminated, the employee occupying that position shall have the right to bump the least senior employee within that classification city-wide, or go on layoff status. The senior employee exercising such bumping rights shall assume the duties, responsibilities and work location of the bumped employee.

C. When two or more employees in the same classification have the same seniority date, the employee to be laid off shall be determined by the Division Director, based upon a review of the overall personnel record. If no significant difference exists, ties will be broken by the drawing of lots. If the affected employee falls under a Memorandum of Understanding

which provides for the breaking of ties, that procedure shall be utilized.

D. Employees who are unable to bump into their own classification but who have obtained permanent status in a previously held city-funded classification have the option to bump, in lieu of being laid off, the least senior employee in a city-funded position in that same classification.

(1) The senior employee shall not have had a break in service since last serving in that classification.

(2) The senior employee shall have a one-time option in which to bump. That option must be exercised within five (5) working days of notification of layoff.

(3) The senior employee shall bump into the most recently held city-funded classification in which the employee has seniority.

(4) No employee can bump into a grant-funded position.

(5) The senior employee is required to meet all current qualifications of that particular job classification.

(6) The senior employee must not have any physical or mental ailment or defect which incapacitates such employee from properly performing in that classification.

(7) Employees who opt to bump shall be paid at a rate determined by their last monthly salary in that previous job classification,

plus all normal or special adjustments that have occurred from the date they left that classification, up to and including the date that the actual bump occurred. Where a pay scale exists, the employee shall be paid the appropriate rate on the scale.

(8) Employees who are subsequently bumped due to this process shall have the same rights as defined above.

E. In exceptional cases, a Division Director may request in writing to the Layoff Committee that a particular employee with less seniority in a given classification be maintained. Such a request will be considered by the Committee if that junior employee has special job skills, specialized qualifications and/or training or other special talents, the loss of which would create a hardship in providing city services.

4. Provisional Employees

A. CETA/PSE employees who are part-time, temporary, probationary or permanent, and city complement employees who are temporary or probationary shall be separated from city employment prior to the layoff of permanent, full-time city employees in the same classification. This procedure shall prevail except when it is determined that it will in fact increase city or divisional operational costs, thus having the effect of not achieving the desired cost-effective purpose of the layoff.

B. All other grant-funded employees shall have their employment under the grant cease in conjunction with the expiration of the grant funding their position.

C. Any such grant employee who has certified seniority from a previously held city-funded position shall have the same rights granted to other permanent, full-time city employees as defined in this layoff policy, as related only to previously held city-funded certified position(s).

5. Layoff Roster

The Personnel Division/Employment Bureau shall maintain a layoff roster. This roster shall include, by classification and according to city-wide seniority, all employees who have been laid off, those who opted to bump to another classification, and those employees who are laid off when bumped.

A. Employees on layoff status may remain on the layoff roster for a period of time not to exceed twenty-four (24) consecutive months. Within said twenty-four (24) month period, the employee's employment status will have been finalized by recall, termination, resignation, or retirement.

B. Employees on the layoff roster, who have previously exercised their bumping rights and remain in city employment, shall maintain their recall rights to the classification from which the layoff occurred for a period of time not to exceed twenty-four (24) months.

C. Removal from the layoff roster which results in separation from city service shall occur when employees have:

(1) been discharged,

(2) resigned,

(3) been laid off for a period of twenty-four (24) consecutive months from the effective date of layoff,

(4) while on layoff status failed to accept an offered position in accordance with this policy,

(5) failed to report for work at the designated date and time,

(6) retired under service, involuntary or deferred retirement,

(7) been determined to have a physical or mental ailment or defect which incapacitates them from properly performing in that classification to which they were recalled.

D. Removal from the layoff roster which results in the employee becoming permanent in their current classification:

(1) been on the layoff roster for twenty-four (24) consecutive months after exercising bumping rights,

(2) failed to accept an offered position after exercising bumping rights.

6. Recall Procedure

When a job is to be filled in a given classification, it shall be offered to the most senior employee within that same classification who is on the layoff roster. Vacancies shall continue to be offered according to descending order on the roster.

A. All laid off and bumped employees who are subject to recall shall be contacted by the

Director of Personnel or his representative by certified mail to the address of record. It is the responsibility of the employee to maintain in writing a current address and telephone number with the Personnel Division/Central Records.

B. When a recall position becomes available, the recalled employee shall have ten (10) working days (Monday through Friday), from the date the letter is stamped by the post office on the Certificate of Mailing, in which to contact the Personnel Division/Employment Bureau with acceptance or rejection of the recall offer.

C. The employee on the layoff roster who is in a layoff status and who is offered the vacant position, shall accept the offer or be terminated from city service.

D. When employees, who have previously exercised their bumping rights and are currently working for the city in another classification, are offered a position in the classification from which they had been laid off and choose not to accept it, the option for that position shall be offered to the next person on the roster. In this case, that employee who chooses not to accept the position shall be removed from the layoff roster and shall be considered permanent in the current classification.

E. An employee who is on layoff status who has no bumping rights and is not currently working for the city in another classification shall be terminated from city service by failure to respond within ten (10) working days or failure to report to work as designated.

7. Non-Affected Vacancies

When a job is to be filled in a given classification where no layoff roster exists for that classification, the job may be filled by an active employee eligible for promotion or transfer.

A. If no active employee is selected, qualified employees on any layoff roster and probationary employees terminated due to the layoff shall be encouraged to apply.

B. If no active employee is selected, qualified employees on any layoff roster who make application and are relatively equal to other applicants shall be given preference.

8. Emergency/Temporary Employees

When it becomes necessary to fill a temporary position in a classification in which a layoff roster exists, the position shall be filled by first offering the temporary job to employees on the layoff roster.

A. An employee on the layoff roster who is offered a temporary position and chooses not to accept it shall not be removed from the layoff roster.

B. An employee on the layoff roster who chooses to accept a temporary position shall remain on the layoff roster. In such a case the employee shall be paid an hourly rate and receive no additional benefits, which is in accordance with city policy, while working in the temporary position. Temporary work shall have no effect on the employee's seniority, pension or layoff status.

BENEFITS

Benefit rights for employees on layoff status

1. Members of City of Memphis Pension Plan:

   A. Employees eligible for service retirement may elect to retire or go on the layoff roster.

   B. Employees with fifteen (15) or more years of creditable service whose position with the city has been abolished or eliminated may make application for involuntary retirement or go on the layoff roster.

   C. Employees with ten (10) or more years creditable service may make application for their deferred pension benefit. This would remove the employee from the layoff roster.

   D. Laid off employees may opt to leave their pension contribution on deposit for the period of time that they remain on the layoff roster or choose to accept refund of their contribution.

      (1) Employees under Article II, City of Memphis Pension Plan (members prior to July 1, 1978) who opt not to withdraw their retirement funds shall upon recall be reinstated under Article II with prior service credit.

      (2) Employees under Article VI, City of Memphis Pension Plan (members on or after July 1, 1978) who opt not to withdraw their retirement funds shall upon recall be reinstated under Article VI with prior service credit.

(3) Employees under Article II and VI, City of Memphis Pension Plan, who opt to have their contributions refunded shall upon recall be reinstated only to Article VI with no prior service credit.

(4) All benefits associated with Pension membership shall cease when employees withdraw their contributions from either Pension article.

E. Upon removal from the layoff roster, which results in termination of city employment, the employee shall be refunded his pension contribution within sixty (60) days or may elect to accept pension benefits for which the employee may be eligible.

2. Hospitalization/Life Insurance

Employees on layoff status may maintain their "Blue M" Hospitalization and Life Insurance coverage in the following manner.

A. The City will make available hospitalization and life insurance coverage during the time that the employee remains on the layoff roster. The employee and the city shall continue to pay their respective proportionate share of the cost of the insurance benefits during the first three months of layoff. Thereafter, the employee shall pay the full amount of the cost of the insurance benefits. Employees who are thirty (30) days delinquent in payment shall have their insurance benefits cancelled. Arrangement for payment of employee contributions can be made by contacting the "Blue M" Insurance office, Room 1B-22, City Hall.

B. Employees who elect not to maintain insurance coverage shall have their coverage cease. Insurance coverage will continue for thirty (30) days from the date of the last payment for cost of benefits. If such employees are returned to city employment, they shall furnish, at their cost, required evidence of insurability in order to be considered for reentry into either of the group plans.

C. Employees who elect not to continue the city's insurance program are eligible to apply for conversion coverage into a private plan. Employees must apply for conversion coverage within thirty (30) days of the last payment. Conversion coverage will be at the existing individual market rate, not at the group rate. Interested employees should contact the "Blue M" Insurance office for details.

3. On-the-Job Injury

A. Medical Benefits - employees who sustain an eligible OJI prior to being placed on the layoff roster shall be entitled to continued medical coverage under the existing OJI policy.

B. Leave Benefits - eligible employees receiving OJI leave benefits at the time they were scheduled for layoff shall have their layoff temporarily postponed until such time as their OJI leave benefits cease in accordance with existing OJI city policy. Such a condition may affect the number of employees laid off in that appropriate classification at the time of layoff and at the time the OJI employee's status is resolved.

C. OJI Half-Pay Benefits - employees receiving OJI one-half pay benefits in accordance with Council Resolution shall continue to receive such benefits as identified by that resolution. At the conclusion of the Council Resolution, all such OJI benefits shall cease according to city policy.

4. Accrued Benefits

A. Employees scheduled for layoff shall receive payment for all eligible leave (vacation, bonus days, and/or compensatory time).

B. Leave or pension benefits will not accrue while an employee is on layoff status.

5. Unemployment Compensation

Any employee who is laid off may make application for unemployment compensation benefits by applying to the Tennessee Department of Employment Security. The city shall provide a separation notice to all laid off employees.

6. Seniority

A. Seniority credit shall cease effective the date of layoff.

B. Employees shall not receive seniority credit during their layoff period.

C. When an employee is recalled from the layoff roster, the employee's service credit shall be reinstated effective the date the employee returns to the active payroll.

D. Employees who are reinstated to their pre-layoff classification shall be compensated at

their previous rate, plus any normal or special adjustments that occurred while on layoff.

7. Tuition Reimbursement

   Employees who are laid off while attending an approved course of study under the Tuition Reimbursement Program will be allowed to continue that course and receive tuition reimbursement benefits. No further reimbursement for course work will be allowed.

8. Employees on Military Leave will not be subject to layoff until the employee returns to active employment status.

HEARING EXHIBIT 2

LIEUTENANT TO DRIVER

10-23-70	1.	Ray M. Cobb B	Pumper
6-5-72	2.	Chester Anderson B	Pumper, A1, A2, A3, A7
6-5-72	3.	Dewey Harris B	Sr. Aerial, Snorkel
6-5-72	4.	Quincy D. McKay B	Pumper
10-30-72	5.	William L. Kegler B	Pumper
1-2-73	6.	Percy M. Alexander B	Sr. Aerial, Tillerman

D.O.E.		INVESTIGATOR TO INSPECTOR
6-22-68	1.	Delbert D. Fry W
11-3-69	2.	Gerald Alsup W

INSPECTOR, LIEUTENANT & DRIVERS

D.O.E.		TO BUMP TO PRIVATE
11-3-69	1.	Lt. Don J. Hulbert B
11-3-69	2.	Lt. Archie Scruggs B
11-3-69	3.	Lt. Herman E. Vaughn W
6-28-71	4.	Lt. Jesse Jones B
6-5-72	5.	Lt. Gus Bailey B
6-5-72	6.	Lt. Robert Downey B
6-5-72	7.	Lt. Raymond Lewis B
10-30-72	8.	Dr. Gary W. Hall W
10-30-72	9.	Dr. Glen Hardin W
10-30-72	10.	Dr. Joseph Hodges B
10-30-72	11.	Dr. Ronald McCarty W
10-30-72	12.	Dr. Elbert Rich B
10-30-72	13.	Lt. Ricky Tate B
12-17-72	14.	Dr. Thomas B. Seever W
1-2-73	15.	Dr. Nelson Boren W
1-2-73	16.	Dr. Robert Freeman B
1-2-73	17.	Lt. John Malone B
1-2-73	18.	Dr. Eddie Newson B
1-2-73	19.	Dr. William C. Pleasants W
1-2-73	20.	Dr. Bennie Shields B
1-2-73	21.	Dr. John Watson W
9-24-73	22.	Dr. Terrold Bilbrew B
9-24-73	23.	Insp. William Billings W
9-24-73	24.	Dr. Donald Kuhn W
9-24-73	25.	Dr. Ronald Moore B
9-24-73	26.	Dr. Brian Nance W
9-24-73	27.	Dr. Andrew Patton B
9-24-73	28.	Dr. Roger Peck W
9-24-73	29.	Insp. Allen Roberts W
9-30-74	30.	Lt. John Alsobrook B
9-26-77	31.	Insp. Ranold Williams W

HEARING EXHIBIT 4

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE
WESTERN DIVISION

Civil Action No. C-74-286

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CITY OF MEMPHIS, a municipal
corporation, et al,
Defendants.

CONSENT DECREE

This action was brought by the Attorney General against the City of Memphis to enforce the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, as amended by the Equal Employment Opportunity Act of 1972 (Pub. L. 92-261, March 24, 1972); the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221, *et seq.*, the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. §1981. The Complaint sets forth certain allegations of the United States of America that the City of Memphis has engaged in a pattern or practice of discrimination based on race and sex in hiring and promotion within the City divisions, including the Memphis Light, Gas & Water Division. This Consent Decree resolves all issues raised by the Complaint with the City other than the employment practices of the Light, Gas & Water Division and the terms of this Decree do not apply to that Division. All issues raised by the Complaint

regarding employment practices at the Light, Gas & Water Division remain outstanding.

The City of Memphis denies it has heretofore engaged in any pattern or practice of discrimination in hiring or promotion on the basis of race or sex but realizes that certain past practices of the City may have given rise to an inference that such practice may have occurred. The City states that it has made good faith efforts to rectify racial or sexual exclusion in City employment and that since January 1, 1972, it has substantially increased blacks and women in the Police Division and blacks in the Fire Division. The City states that for the purpose of avoiding any further inference of discrimination, it has heretofore taken certain steps to increase the availability of qualified black and female employees by transfer and promotion, training programs, and career ladder programs in City employment.

For the same purpose and with the same intent the City is now willing to agree to the entry of a consent decree providing for additional measures to be taken. Both parties wish to avoid the delay and expense of litigation and desire to insure that any disadvantage to blacks and females that may have resulted from any past discrimination in obtaining employment and advancement is remedied so that equal employment opportunity will be provided to all. The City of Memphis and the United States, by agreeing to the issuance of this order, waive a hearing and finding of facts and conclusion of law on all issues raised by the Complaint with respect to employment by the City except employment at the Light, Gas & Water Division and the parties have mutually agreed to the entry of the consent decree, which shall not constitute an adjudication or admission by the City of any violation of law or findings on the merits of this case.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The Defendant City and its officials, agents and employees and all persons acting in concert with them in the performance of City functions shall not engage in any act or practice which has the purpose or effect of unlawfully discriminating against any employee of, or any applicant or potential applicant for employment with the City of Memphis because of such individual's race or sex, it being understood that remedial actions and practices permitted by this Decree shall not be deemed discriminatory. Specifically, the Defendant City shall not fail or refuse to hire, promote, upgrade, train or assign any individual, discharge any individual or otherwise discriminate against an individual as an employee or applicant for employment with respect to compensation, terms, conditions or privileges of employment because of race or sex.

2. The provisions of this Decree are intended to cover all full-time employment with the City of Memphis, except that the goals and other affirmative relief established herein, including affected class relief, shall not apply to employment in the Memphis Transit Authority, the Memphis-Shelby County Health Department, the Memphis-Shelby County Auditorium Commission, the Mid-South Coliseum, the Memphis-Shelby County Planning Commission, the Memphis-Shelby County Airport Authority, the Memphis Housing Authority, the Board of Education of the Memphis City Schools, Memphis-Shelby County Public Library and the Memphis-Shelby County Hospital Authority, said organizations either being separate authorities or administered through the County of Shelby; and provided further that the provisions set forth in the succeeding paragraphs do not apply to part time employment unless the provision so states.

3. The purpose of this decree is to insure that blacks and women are not placed at a disadvantage by the hiring, promotion and transfer policies of the City, and that any disadvantage to blacks and women which may have resulted from past discrimination is remedied so that equal employment opportunities will be provided to all. The City has agreed that in determining whether that purpose has been achieved, an appropriate standard of comparison is the proportion of blacks and women in the Shelby County civilian labor force. The City, therefore, agrees to undertake as its long term goal in this decree, subject to the availability of qualified applicants, the goal of achieving throughout the work force proportions of black and female employees in each job classification, approximating their respective proportions in the civilian labor force. Except as otherwise provided in paragraphs 4, 10, and 15 below, the City shall, in meeting the long term goal for black employees, establish and attempt to meet an interim goal, in classifications where the long term goal has not been met, of filling at least 50% of all vacancies with qualified black applicants. The City in meeting the long term goal for women shall actively encourage female employees in clerical positions to seek transfer or promotion to those positions where the long term goal has not been met, and shall employ affirmative recruitment efforts for female applicants for those positions which are entry level classifications. Except as provided in paragraphs 4, 10, and 15, no specific interim numerical goals shall be established for women for the initial year of this Decree. After February 15, 1976, the parties shall meet with the City to determine appropriate interim goals for women for those job classifications in which the long term goal has not been met. In no event shall the City be required to hire unnecessary personnel, to hire, transfer or promote a person who is not qualified or to hire, transfer or promote a

less qualified person in preference to a better qualified person, nor shall the City apply any standard for employment which does not validly measure qualifications for that position. Compliance with interim goals established pursuant to this decree shall be measured on an annual basis except where otherwise specifically provided.

4. The City shall, for those positions such as accountant and engineer which require a professional degree, establish and attempt to achieve an initial interim goal of filling 30% of the total vacancies in such positions with qualified black and/or female applicants. The level of this interim goal shall be reviewed by the parties after February 15, 1976, on the basis of performance of the City in the period and the availability of qualified black and female applicants in these professional areas.

5. (A) Insofar as the term "affected class" is used in the provisions of this Decree, it shall include:

(1) Incumbent black full-time employees hired prior to January 1, 1972, in the Public Works and Sanitation Division, and in the Park Commission, who are in pay grades 51-52-53-54-55, except for the positions of Zoo Keeper and Auto Inspection I and II, and to include service truck and wrecker operator, and all other black incumbent employees who are employed in positions considered classified which exist below grade 9 in the City's current pay plan.

(2) Female incumbent full-time employees in position which are by job title or description clerical in nature.

The defendant agrees to furnish to the plaintiff within ninety (90) days after the entry of this decree a list of the members of the affected class by job classification and individual seniority date.

6. (a) The City shall, for all purposes of promotion, transfer and assignment, compute the seniority of a person in the affected class as defined in paragraph 5, as the total seniority of that person with the City.

(b) Except as otherwise provided in paragraphs 10 and 15 for filling vacancies in the Police and Fire Division and in supervisory positions, the following procedure shall be followed in filling vacancies under this decree:

(1) A member of the affected class shall be given the initial opportunity to fill any vacancy in the City where the person is the senior applicant who meets the minimum qualifications for the position. This preference is exercised at the written election of the applicant. An affected class member using this preference who successfully transfers to and holds a position, as defined in paragraph 8, shall be considered on the same basis as other applicants on subsequent bids, subject to 6(a) above.

(2) Where no affected class member seeks or is entitled to a vacancy as provided in (1) above the vacancy shall be filled pursuant to the procedures set forth in the City's Civil Service Ordinance and in the City's labor memoranda subject to 6(a) herein and in a manner consistent with meeting the goals set forth in the decree.

7. All members of the affected classes shall be notified of the provisions of this Decree and specifically of the opportunity to transfer and/or promote to other positions when such vacancies occur and are posted for bid by the City Personnel Division. At least ten (10) days before any such vacancies are to be filled, notices of the vacancies shall be posted at each location and in each department where a member of the affected class is employed. Ap-

pointed positions listed under Charter Section 248 (d), (e), (f), (g), and (h) are excluded from this posting requirement.

8. If a member of the affected class shall transfer or promote to a new position pursuant to paragraph 6(b)(1), the person shall be given a reasonable opportunity of up to ninety (90) days or up to six (6) months under Civil Service, as appropriate, to determine if he or she wishes to remain in the position or for the City to determine if he or she is able to perform the job. Should the person wish to relinquish the position, or the City determine that the person is not able to perform the job, the person may return to the previously-held position with the same pay as prior to transfer and without loss of seniority. Whenever such a person is determined by the City not to be qualified or capable of performing in the position, the City shall submit in its periodic reports to the United States a written statement detailing the basis for the person's removal from the position. It is agreed that nothing in this Decree shall require Defendant to keep an employee in any position after the trial period in which the employee cannot perform the assigned tasks as adequately as such tasks have generally been performed in the past or if the employee's work habits or attendance are inferior as compared with other employees doing similar work.

9. No member of the affected class who makes a lateral or downward transfer for the purpose of enhancing promotional opportunities, shall be paid at a lower rate than the rate for the job from which the person transferred, including any regular within grade increments the person would have received had the person remained on that job. A person utilizing rate retention pursuant to this paragraph who returns or is returned to the original job pursuant to paragraph 8, may utilize the right to rate retention on a sub-

sequent transfer, provided, however, that this right to rate retention may not be exercised on more than three occasions. The right to rate retention shall continue until the person has reached that level in the new department or line of progression where the rate of pay is equal to or higher than that in the previously held job classification. A transferee shall lose this privilege of rate retention if the person refuses a promotion in the new line of progression or fails to bid on a higher rate job in the new department for which he or she is eligible.

10. Subject to the availability of qualified applicants, the City will establish and attempt to achieve from the date of this decree through June 30, 1976, the following goals: An interim goal of increasing the level of black employment in uniform positions in the Fire Division by five (5) per cent of the total uniformed personnel; an interim goal of increasing the level of black employment in the Police Division by seven (7) per cent of the total uniformed personnel, and an interim goal of increasing the level of female employment in uniformed positions in the Police Division (other than parking meter patrol) by between four (4) and five (5) per cent of total uniformed personnel, it being understood that a female black employee counts in both percentages. All of said goals are subject to the anticipated budgeted vacancies in the City. The Fire and Police Divisions shall be reviewed at the close of the initial period as specified above and goals for succeeding periods will be established which will be based on filling anticipated vacancies in these divisions with black and female personnel in approximately the same manner as in the initial period. No specific numerical ratio for employment of black or female patrol officers or black fire fighters shall be established unless the City fails in its good faith attempt to meet the interim goals established pursuant to

this paragraph. The question of goals for female fire fighters will be reviewed by the parties at the end of the initial period.

11. (a) In filling vacancies in the entry level positions in the Police and Fire Divisions the City shall emphasize recruitment from among qualified members of its affected class, including establishing such programs as the joint City-IAFF recruitment and training program for firefighter applicants, recognizing that physical requirements will be a prime consideration for said positions. The City shall emphasize in all recruitment activities for the position of firefighter and police officer that these positions are available to women.

(b) There shall be no discrimination on the basis of race or sex with respect to duty assignments within the Police and Fire Divisions, except in the Police Division as may be legitimately required by the special nature of the assignment.

12. The City may maintain its current education standard and selection procedure for firefighter and police officer, provided, however, that should the City be unable to meet the goals for the Fire Division and Police Division established pursuant to paragraph 10 above, the education standard or selection procedure shall be modified to the extent necessary to meet those goals.

13. The City may continue to use on a pass-fail basis written promotional examinations for the Fire and Police Divisions. However, the City shall evaluate these examinations and promotional testing procedures during the initial year of this decree to insure that the use of these examinations will not have an adverse impact on black or female applicants. The parties agree that adverse impact will be shown if the adverse differential in the failure rate

for blacks or females is in excess of five (5) per cent. The City shall maintain records of the results of all such examinations sufficient to determine the impact on black and female applicants and shall provide this information to plaintiff within two weeks after administration and scoring of the examination.

If the parties disagree on the adverse impact of the tests, the City agrees to meet and confer with plaintiff before acting on any results. If the parties cannot agree after said conference, plaintiff may apply to the Court within thirty (30) days for the Court to resolve the matter, with the City agreeing to withhold action on any test results pending said determination.

14. The City recognizes the need to increase substantially the numbers of blacks and female sworn personnel in the ranks above fire fighter and patrol officer with the intent to reflect more nearly their proportions among the personnel of these divisions. While no specific numerical goal will be established for these positions during the period ending June 30, 1976, the City commits itself to making significant progress in increasing the number of black and female supervisory personnel. The need for such numerical goals in subsequent fiscal years will be determined by the parties after review of the performance of the City during the preceding fiscal year.

15. The City Personnel Division shall immediately review the files of all incumbent black and female employees to determine which are qualified to hold supervisory positions. These employees shall constitute a promotion pool to be augmented quarterly by other black and female employees found to be qualified. The provisions of this paragraph, however, do not apply to the rank structure in the Fire and Police Divisions.

Any black or female employee who has seniority in his or her occupational group or department equal to that of the most junior white foreman or supervisory in the same occupational group or department at the time he was promoted to a foreman or supervisor, shall become a member of the promotion pool unless the employer shall determine on the basis of a review of objective criteria of work performance and other qualifications that such employee is not qualified for supervision. In all such cases the employer shall set forth in its periodic report to the United States, in specific factual terms, the employer's reasons for such determination.

Utilizing this pool or outside recruitment as deemed appropriate by the City, the City shall adopt and attempt to achieve a goal of filling fifty (50) per cent of the total vacancies in supervisory positions with blacks and females, subject to the availability of qualified applicants.

This procedure shall be continued until such time as the number of blacks and females in supervisory positions substantially meets the long-term goals established in paragraph 3 hereof. In the filling of vacancies in supervisory positions, pool members with no supervisory experience shall be limited to filling vacancies at the first level of supervision. Nothing in this paragraph or Decree should be construed in such a way as to require the promotion of the unqualified or the promotion of the less qualified over the more qualified as determined by valid standards.

16. (a) Except as provided in paragraph 13, defendant City shall discontinue the use of all written examinations for employment and promotion except the employment and promotional tests of actual job content for positions such as typists, stenographers and similar positions. The City may continue to utilize skill tests of actual job content for other occupations until such time as a test

indicates a significant adverse impact on black or female applicants. If plaintiff believes that any such test has significant adverse impact on blacks or females, plaintiff shall so notify defendant and the parties will meet within thirty (30) days to determine whether defendant can show that the test is lawful under Title VII and the guidelines issued thereunder. If the parties are unable to resolve the matter within forty-five (45) days of notification, the matter will be submitted to the Court for adjudication. Defendant agrees that it will not act upon the result of any such test during efforts at voluntary resolution of the matter, and, resolution failing, for a subsequent period of fifteen (15) days to allow plaintiff to seek an order from the Court regarding interim utilization of the test results.

(b) Should the defendant wish to utilize written examinations for hire, promotion or transfer other than skills tests covered in (a) above, copies of the tests shall be forwarded to the plaintiff for approval at least ninety (90) days prior to the utilization of the test results, together with sufficient information including data on the validity and the relative impact by race and sex, to show that such tests are lawful under Title VII and the guidelines issued thereunder.

Defendant shall not utilize any such test results without prior written approval of the plaintiff, or, if the parties are unable to agree on the lawfulness of the test, prior approval by the Court of the use of the test results.

Nothing in this paragraph shall prevent the administration of tests on a research basis during the term of this decree, provided the results of such tests are not utilized in any manner in hiring, promotion or transfer decisions or in the evaluation of personnel, and the scores and/or relative performance of the persons tested are

kept secure, i.e. are not made known to employees other than those Personnel Division employees or consultants directly involved in the analysis of the test.

17. (a) Except as provided herein for the Fire and Police Division, the use of the education or equivalent experience requirements reviewed by the plaintiff may be continued with the parties agreed that applicants for hire, promotion and transfer will not be barred from consideration by the lack of formal education requirements. In determining eligibility for consideration for supervisory positions, satisfactory performance in the position next below the supervisory position sought, shall be deemed the equivalent of the education requirement, except where the position sought requires a college degree and requires job knowledge substantially different in nature and degree from that required in the position next below.

(b) If a dispute arises among the parties over the employer's application of job requirements to a black or female applicant, or over the requirements set out for a particular position or group of positions, they shall meet promptly to resolve the dispute. If the parties cannot agree, the matter shall be presented to the Court for resolution.

(c) The City shall submit all new job descriptions or modifications in the position requirements in current job descriptions to the plaintiff for approval at least 30 days prior to the proposed date of implementation. If plaintiff indicates disapproval of the requirement within that period, the new or modified standards shall not be utilized until the dispute is resolved by the parties, or the Court.

18. The City shall within one year of the date of this decree provide training and/or apprenticeship pro-

grams for craft positions and a training program for first level supervisory positions designed to enable members of the affected class to move into such positions. The craft training or apprenticeship programs developed pursuant hereto shall include programs for the job classifications of Heavy Equipment Operator, Carpenter, Auto Inspector, and Housing, Building, Electrical and Plumbing Inspectors. The City shall, in addition to the report provided in 21 (g) below, provide the United States with a description of the size and content of each such training or apprenticeship program at least sixty (60) days prior to its implementation, the anticipated size of the program to be determined by the nature of the program, the number of anticipated vacancies in the job classification and the requirement for meeting the interim goals for black and female employment established for these positions by this decree.

19. The City will engage in affirmative recruitment activities consistent with their obligation to take all reasonable steps to reach the goals set forth in this decree, and to insure that the City's policy of non-discrimination in hiring is emphasized to blacks and women. These recruitment activities shall include maintaining their contacts with area high schools, technical and vocational schools, and organizations such as the Urban League, the NAACP, NOW, Operation PUSH, Tennessee Department of Employment Security, and WAGES and informing them of employment opportunities in the City. In addition, where appropriate, advertising of employment opportunities shall be placed in mass media primarily directed to black and female audiences.

20. The City shall retain during the period of this decree necessary records to support the implementation of this decree. These records shall be made available to the

Department of Justice for inspection and copying upon written request.

The City will maintain the following records:

(a) A list of all organizations and schools which are contacted pursuant to paragraph 19, showing the date that any notice of job opportunity was mailed to them, the position and number of positions to be filled from that notice and the date through which applications could be received for the job which was advertised.

(b) A summary or compilation of all other recruitment efforts aimed at minorities and women, together with the date of said efforts and the names and positions of defendant's employee who made the contact and the nature of the contact.

(c) All applications and related records for all persons seeking employment with the City, including applications for transfer within each, and shall include on such applications identification of the applicant by race and sex. The records retained shall include, where applicable, copies of tests administered and the test results.

(d) All written communications between the City and applicants for both initial entrance, transfer and promotion.

(e) The list of members of the supervisory pool required by paragraph 15.

(f) Sufficient records will be maintained on part-time, temporary and seasonal employees to assure accurate and complete reports for these employees as required in paragraph 21 (h).

21. Within ninety (90) days after the entry of the Decree, and following June 30 and December 31 of each subsequent year during the term of this Decree, the City

shall report to the Attorney General the following information:

(a) A summary showing the total number of employees by race and sex in each job classification of the City.

(b) A report showing the positions for which persons in the affected class have applied, name of the person, the dates of such applications and whether or not such applications were successful. The report should also show any positions which the persons in the affected class have been offered but which they refused showing both the job offered and the dates thereof.

(c) A list of all newly hired employees indicating the name, race, sex and job classification of each since the last report was filed.

(d) A list of all persons, by job classification, to whom promotion has been offered under paragraph 15 of this Decree and whether or not that promotion has been accepted.

(e) A breakdown of the applicant flow of the City by race and sex which indicates the number of applicants by race and sex hired, rejected and pending for each job classification. A person is considered an applicant for this purpose upon filing a formal application when a job is posted and upon meeting the minimum qualifications for the position.

(f) A list of all promotions, name, race, sex and date of hire of the employee promoted and the date of the promotion.

(g) A report covering the operation of each of the training programs provided for in paragraph 19,

listing the name, race and sex of each person in the program during that reporting period, the dates of entering and where applicable the date of completion of the program for each such person, and where applicable, the name, race, sex and date of promotion for each person who having completed the training program was promoted during the reporting period into a vacancy in the craft or supervisory positions covered by the training program.

(h) A list of part time employees, to include race, sex, and job classification and term of employment.

22. Copies of this Decree shall be provided by the Plaintiff to be posted in conspicuous locations within each Division. Further, the City shall appoint an EEO officer in the Personnel Division of the City whose duties shall include:

(a) To advise black and female employees of the terms of this Decree;

(b) To receive and investigate complaints of race and sex discrimination; and to conciliate when appropriate; and

(c) To maintain a complete record of all actions taken in pursuit of the duties outlined above, including all correspondence directed to the defendant and/or any investigatory files. The individual appointed as EEO officer shall be sensitive to the issues involved in this matter and his office hours and location shall be posted conspicuously beside the Consent Decree.

23. The Court retains jurisdiction of this action for such further orders as may be appropriate. At any time

after five years subsequent to the date of the entry of this Consent Order, the City may move the Court upon 45 days notice to the plaintiff for dissolution of this decree, and in considering whether the decree should be dissolved, the Court will take into account whether the City has substantially complied with this decree and whether the basic objectives of the decree have been achieved.

.....

Judge

APPROVED:

.....

Gerald F. George
Grover G. Hankins
Naomi E. White
Attorneys for Plaintiff United States

Frierson M. Graves, Jr.
Attorney for City
of Memphis

MEMORANDUM OF UNDERSTANDING BETWEEN THE CITY OF MEMPHIS, TENNESSEE AND LOCAL 1784, IAFF (EFFECTIVE 1975 TO 1978) (ARTICLE XIX) (HEARING EXHIBIT 5)

(Reproduced in Petition for Certiorari of Union at A.80)

MEMORANDUM OF UNDERSTANDING BETWEEN THE CITY OF MEMPHIS, TENNESSEE AND LOCAL 1784, IAFF (EFFECTIVE 1978 TO 1981) (PREAMBLE, ART. I AND XIX) (HEARING EXHIBIT 6)

PREAMBLE

This Agreement is entered into by the City of Memphis, Tennessee, hereinafter referred to as the City or Employer, and Local 1784, International Association of Fire Fighters, hereinafter referred to as the Union.

It is the purpose of this Memorandum of Understanding to promote harmonious relations, cooperation, and understanding between the City, the Union and employees covered hereby, to insure the well being of said employees and the efficient and economical operation of the departments in which they are employed, to establish and maintain a basic understanding relative to personnel policies and procedures for the equitable and peaceful discussion and adjustment of differences which may arise, as related to wages, hours and other conditi[illegible] employment.

ARTICLE I

Recognition and Bargaining Unit

The employer recognizes the Union as a designated representative for certain employees of the Division of Fire for the purpose of conferences and meetings on wages, hours and conditions of employment to the full extent and authority provided by the Charter of the City of Memphis and the laws of the State of Tennessee.

The term "certain employees" as used herein places no limitations or restrictions on the right of an employee to belong to and be represented by the Union.

Certain employees shall mean those uniformed employees of the Division of Fire as specified in Article XXXVII — Salary. Employees in the payroll and personnel sections are excluded. Probationary employees, for the duration of the twelve (12) months probationary period, are excluded. This probationary period may be extended for not more than six (6) months when recommended by the Director of Fire and approved by the Director of Personnel and when the reasons for such extension are provided in advance to the President of the Union.

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ARTICLE XIX

Seniority Preference

SECTION 1—The City shall provide to the address of Local 1784 within ten (10) days of the signing of this Agreement a Seniority List, alphabetically by rank, showing the name, date of employment, and Citywide seniority for all employees in this bargaining unit.

SECTION 2—The City agrees to furnish to the address of Local 1784, upon request, a Division Table of organization relative to this bargaining unit showing authorized strength, assigned strength, and changes of authorized strength indicating the effective date of such change.

SECTION 3—In-Rank Transfers

A. When the Division determines the need to fill a vacancy in a classification in the Fire Fighting Bureau covered by this Memorandum of Understanding, notice of such vacancy will be posted for ten (10) calendar days on all bulletin boards. At the end of the ten (10) day notice period, all requests for in-rank transfers will be reviewed and

the vacancy will be awarded to the senior qualified employee. 1630 hours of the tenth notice day shall be the cut-off time for receiving transfer forms. An employee may exercise such transfer preference one time during a twelve (12) month period from date of transfer.

B. Employees who request such transfer and are denied such transfer and who are senior to the employee selected shall be given in writing by the District Chief the basis of the denial and suggested areas for improvement.

C. Employees transferred pursuant to Item A of this Article, in order for permanent placement, shall be required to successfully complete a sixty (60) calendar day trial period. During such trial period the Division will evaluate the employee's performance to assure that he/she performs at an acceptable level of competence in all phases of the position. Employees who fail to successfully complete the trial period may be transferred to any available opening at the Division's option. The evaluation of transferred employee's performance shall be the responsibility of the appropriate District Chief who may, at his discretion, utilize a review board that may consist of supervisors, peers, and/or subordinates who are knowledgeable of the individual's job performance. If utilized, such a board will be responsible to objectively evaluate the employee and to communicate their recommendation in writing to the District Chief. The District Chief will consider the board's recommendation when making his final evaluation.

D. In-Rank Transfer provisions shall be limited to the initial vacancy in a classification and not to openings created by the initial transfer.

E. Prior to filling vacancies with recruits, openings will be posted thirty (30) days in advance and transfer requests honored as specified above prior to the remaining openings being filled with recruits, provided however, that this policy shall not result in more than one recruit being placed on any single Company.

F. It is agreed between the parties that the above provisions related to Section 3, In-Rank Transfers, is on a trial basis for the term of this Agreement and after one year is subject to mutually agreeable changes within the Labor-Management Committee.

SECTION 4—Temporary assignments shall be for a specific duration and shall be so identified. The employee will be transfered back to his previous assignment upon the completion of the temporary assignment.

SECTION 5—Lay-Off

In the event it becomes necessary to reduce the Fire Division, seniority alphabetically shall govern lay-offs and recalls. Employees lowest in seniority shall be laid off first and shall be the last to be recalled. Members laid off shall be given thirty (30) days notice prior to the effective date of lay-off.

MEMPHIS FIRE DEPARTMENT FIRE FIGHTING CLASS (HEARING EXHIBIT 7)

(Reproduced in Petitions for Certiorari of Union and City at A.70)

ORAL RULING OF THE DISTRICT COURT

(Reproduced in Petitions for Certiorari of Union and City at A.72)

ORDER GRANTING PRELIMINARY INJUNCTION ENTERED MAY 18, 1981

(Reproduced in Petitions for Certiorari of Union and City at A.77)

(Filed May 18, 1981)

(Caption Omitted in Printing)

APPLICATION FOR STAY PENDING APPEAL ON BEHALF OF DEFENDANTS

The Defendants in the above entitled cause, respectfully move the Court pursuant to Rule 62(c) of the Federal Rules of Civil Procedure to stay execution of the preliminary injunction in the above entitled cause entered May 8, 1981, pending appeal to the Court of Appeals for the Sixth Circuit for reasons set forth in the Memorandum attached hereto.

Clifford D. Pierce, Jr.
City Attorney
By: /s/ Louis P. Britt III
Assistant City Attorney
McKnight, Hudson, Lewis
& Henderson
Suite 2222, Clark Tower
5100 Poplar Avenue
Memphis, Tennessee 38137
Telephone: 901/767-3170

[Certificate of Service Omitted in Printing]

(Entered May 18, 1981)

(Caption Omitted in Printing)

MOTION OF INTERVENOR FIREFIGHTERS LOCAL UNION NO. 1784 TO STAY INJUNCTION PENDING APPEAL

Comes now intervenor Firefighters Local Union No. 1784 and, pursuant to Rule 62 of the Federal Rules of Civil Procedure and Rule 8 of the Federal Rules of Appellate Procedure, hereby moves this Honorable Court for an order staying the injunction heretofore entered by the Court against the municipal defendants, pending the hearing and determination of defendants' appeals to the United States Court of Appeals for the Sixth Circuit from the injunction.

Intervenor Firefighters Local Union No. 1784 submits: (1) that it will likely prevail on the merits in the appeal; (2) that it will suffer irreparable injury if the stay of injunction is denied in that personnel otherwise entitled to rights conferred by the city-wide seniority system will suffer loss of wages and benefits upon layoff which may not be compensable even if the injunction issued herein is found to be invalid on appeal; (3) that other parties will not be substantially harmed by the stay, and (4) that the public interest will be served by granting the stay.

WHEREFORE, intervenor Firefighters Local Union No. 1784 prays that the preliminary injunction be stayed pending the hearing and determination of defendants' appeals to the United States Court of Appeals for the Sixth Circuit, and that intervenor Firefighters Local Union No. 1784 should be accorded such other and further relief as it may be entitled under the premises.

Intervenor Firefighters Local Union No. 1784 requests a hearing on this motion pursuant to Local Rule 8(c).

Respectfully submitted,

Hanover, Walsh, Jalenak & Blair
By Allen S. Blair
By James R. Newsom III
Attorneys for Firefighters
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[Certificate of Service Omitted in Printing]

(Filed May 18, 1981)

(Caption Omitted in Printing)

ORDER DENYING APPLICATION FOR STAY PENDING APPEAL

This cause came on to be heard on May 19, 1981, on Defendants' and Intervenor's Applications for Stay Pending Appeal, and it appearing to the Court that for the reasons appearing in the Order Granting Preliminary Injunction filed herewith Defendants' and Union's Application for Stay should not be granted.

IT IS ORDERED that Defendants' and Intervenor's Applications for Stay Pending Appeal be and hereby is denied.

ENTERED this 18th day of May, 1981.

/s/ Robert M. McRae
Chief Judge

APPROVED FOR ENTRY:

/s/ Richard B. Fields
Ratner & Sugarmon
Attorneys for Plaintiffs

/s/ Louis P. Britt III
Frederick J. Lewis
Office of the City Attorney
Attorneys for Defendants

/s/ Allen S. Blair
Hanover, Walsh, Jalenak & Blair
Attorneys for Intervenor

(Filed June 22, 1981)

(Caption Omitted in Printing)

MOTION FOR ADDITIONAL RELIEF PURSUANT TO THE MAY 8, 1981 PRELIMINARY INJUNCTION WITH SUPPORTING MEMORANDUM

Pursuant to this Court's Order of May 8, 1981, a preliminary injunction was granted to plaintiffs and it prohibits the disproportionate lay-offs or demotions of black employees in the positions of lieutenant, inspector, driver, and private. Subsequent to this order, counsel for plaintiffs has learned that additional positions are scheduled for lay-off and/or demotion and that black employees will be adversely affected. These positions are as follows:

	BLACK	WHITE
Fire Alarm Operator I	5	5
Home Safety Fire Representative	14	3
Fire Prevention Supervisor	1	5
Clerk Typist	3	6
Research & Development Lieutenant	1	0

We request that these classifications be added to the preliminary injunction so that blacks will not be disproportionately laid off or demoted.

Because the City has not yet filed a proposed plan to comply with the injunction, we also request that the City be ordered to file a plan no later than noon on Wednesday, June 24, 1981 with this Court and hand-deliver the plan to plaintiffs' counsel. If the plan does not meet the requirements of the injunction, then plaintiffs request a hearing be held no later than Friday, June 26, 1981, to hear objections to the plan. The plan should include the following information:

1. A designation of each position or classification to be affected by lay-offs and/or demotions;
2. The current vacancies in the Memphis Fire Department;
3. The names of individuals to be laid off or demoted; and
4. A current list of all employees in the Fire Department by name, classification, seniority date, and race.

The City has scheduled Friday, June 26, 1981, as the effective date for lay-offs and/or demotions, and, therefore, we request the above schedule be strictly adhered to by the City.

Respectfully Submitted,

/s/ Richard B. Fields
Ratner & Sugarmon
525 Commerce Title Building
Memphis, Tennessee 38103
Attorney for Plaintiffs

[Certificate of Service Omitted in Printing]

ORDER GRANTING INJUNCTIVE RELIEF IN PART ENTERED JUNE 23, 1981

(Reproduced in Petition for Certiorari of City at A.80)

ORDER EXPANDING PRELIMINARY INJUNCTION ENTERED JUNE 25, 1981

(Reproduced in Petition for Certiorari of City at A.82)

TRANSCRIPT OF HEARING BEFORE THE DISTRICT COURT ON JUNE 23, 1981 (TESTIMONY OF JOSEPH D. SABATINI)

[2] JOSEPH D. SABATINI

The said witness, having been first duly sworn, testified as follows:

MR. BRITT: Your Honor, if the Plaintiff wants to have some direct examination, since he is bringing this action, I have no objection. Or if you would rather me to conduct the examination I will.

THE COURT: All right, I want you to ask him what I want to know.

MR. BRITT: I will try to do that, Your Honor.

Direct Examination

By Mr. Britt:

Q. Would you state your name to the Court, please? A. Joseph D. Sabatini.

Q. And what is your position, Mr. Sabatini? A. Director of Personnel of the City of Memphis.

Q. And are you involved in this layoff procedure that we are talking about today? A. I am.

Q. The Court has expressed some concern over the [3] implementation of the layoff plan that the City proposes to implement under the Court's injunction, and considering that would you explain the procedure that the City intends to implement? A. Okay, I think first of all I would like to note that late in May we put a notice out on all of the bulletin boards throughout the Fire Division, pending the outcome of the litigation that there was a need and a plan to reduce force in the classifications of private, driver, lieutenant and inspector, and all people in the Division were made advised of that, and as I had had prior communication with Mr. Fields and felt that that was the best approach to put people on notice that something was going to happen as of the 26th, and that what exactly was going to happen was not yet defined.

At the same time, and through the period up to now, we continuously keep watch on each classification, the number of people in the classification.

We are prepared logistically.

We are aware that it will be a fairly difficult process, but not insurmountable. The layoff procedure has been addressed to over two hundred and fifty people so far, and with each exercise we become a little more accustomed to addressing that policy, and we feel very comfortable that starting either tomorrow afternoon or Thursday morning [9] we can approach these particular classifications and the people in them and have them identified, offer the options, to them, let them exercise those options, and have that resolved by the end of the day Friday.

THE COURT: You say approach, what do you mean by that, are you talking about some person will confer with a member of the Fire Department?

A. Where possible, where there are people on shift, we will meet with those people. First we will start contacting those people by telephone even though they may be scheduled the next day, as soon as possible, and as much on a personal basis as we can.

Again, I think that figure is somewhere around forty or fifty people which we do not see to be a major problem.

THE COURT: You think it will be Friday afternoon before you will know what person has what job?

A. Well—

THE COURT: (Continuing) Because of the bumping and other things?

A. We have a plan put together as to where to start the notification, there is a Deputy Fire Marshall who will be bouncing down somewhere in the organization, and we will come down that hierarchy, and then bouncing and bumping as we come down that hierarchy.

THE COURT: Are you in charge of this?

[10] A. Yes, sir.

THE COURT: Well, have you discussed with Mr. Britt the order the Court was asked to issue yesterday about filing a plan by Thursday morning?

A. I understood it to be Thursday afternoon but, yes, I was advised.

THE COURT: All right, what does that mean?

What kind of plan?

We had a discussion yesterday, Mr. Britt didn't think you would have the names of people who would be laid off by that time?

A. Yes, sir, I think it is a clarification of names, due to the fact of the option of the employee being affected to bump or to take retirement or to take a layoff.

And I think to get the specific names is just a mechanical process that would allow us to get these specific names.

THE COURT: But that's going to take until Friday?

A. No, sir, I don't think it will take long, I would say by the end of the day Friday each of these employees will have the opportunity to exercise their option and know where to report to work on the next shift, or whether or not they will be laid off.

THE COURT: All right, now, what are you going to do if the Court of Appeals issues a stay at noon [11] Friday?

A. We will go back to the City plan, sir.

THE COURT: All right, do you have any questions, Mr. Fields?

MR. FIELDS: Yes, sir.

Cross Examination

By Mr. Fields:

Q. Now, Mr. Sabatini, when will the people have to make their options? A. I am sure, Mr. Fields—Well, I'm not sure, I will speculate, because of the notice that was put out on the 28th of May that most of the people who suspect that they may be affected have considered what those options are. We hope that's true. We will be approached by them, as I say, no earlier than tomorrow noon and no later than Thursday morning.

Q. Now, as you know, the injunction specifies that you are supposed to maintain a percentage of blacks in each classification that comes under the injunction? A. That's correct.

Q. As of what date are you determining what this percentage is? A. We will determine that date, I assume, at this particular point in time, that the point in time that we implement that.

Q. So tomorrow you will have determined what percentage you will have in each of these classifications? [12] A. Yes, I think, to give you an example, if I may, on the way we are approaching this.

Judge—

THE COURT: Have you got an extra copy?

A. Yes.

(Document passed to opposing counsel and the Court.)

A. I think our plan is basically, I believe right in compliance with the Judge's order, Mr. Fields, and ready to go into effect.

What you don't see here are the names, and I explained that earlier, and I will add to that, and I think we have a concern for the accuracy of the information generally when you are talking about one's job, not to be in error in terms of identifying who is going to be laid off and who isn't.

So what you are looking at is simply numbers from the least senior to the most senior, and you will see that in order to comply with the percentage balance, instead of the twenty-eight positions which would be the City's proposal to lay off, we would proceed to thirty-seven positions. And in that process we would bypass four blacks, as you see circled.

Q. All right. [13] A. (Continuing) To go beyond the twenty-eight.

Q. So you have already determined the percentages then? A. Yes, sir.

Q. For each classification? A. And we have looked at that periodically as there are changes in the organization.

Q. So your last change will be tomorrow if there were any changes that somebody quit or say died tomorrow? A. As I said before, I rely on legal counsel, but I assume it would be at the point of the implementation.

Q. That's fine, so what you have here then really you have both plans, if you have to—If you comply with this injunction you have one plan, and if this injunction is stayed for any purpose then you have your alternate plan ready to go, too? A. That's correct.

MR. FIELDS: Okay, that's fine. All right, Judge.

THE COURT: All right, do you want to bring anything else out?

MR. FIELDS: I'm sorry, excuse me, Your Honor.

Q. Now, we've got a problem, Mr. Sabatini, with some positions you have eliminated entirely. I have one particularly with a black lieutenant who is in Research and Development, who has been detailed, I found out yesterday, to Personnel [14], and who is disabled and will not have any bumping rights.

Have you made any provisions for that particular individual? A. If you are talking about special or separate arrangements, no we have not.

The gentleman has, of course, the option to bump back, and as we acknowledge he is not physically fit to perform in his previous capacity. If he is eligible for retirement, yes, that option is available to him.

If he cannot perform the job, of course, then he is scheduled then for layoff, which I believe is the case in this particular situation.

We are attempting to place as many people as we car since in effect these people are not only out of employment, but there is also a selfish motive in that there are unemployment costs incurred by the City for each employee laid off.

We have a plan that is put together that is intended to help as many employees as possible. So far in-house we have reemployed about eight people, and we have a layoff policy committee. If this gentleman, should they feel, that there is extra treatment due him, or that he has been treated unfairly, or whatever, can appear before this layoff policy committee, we have had several employees come to us and some requests have been rejected and some have been [15] accepted.

There are no special rights for this gentleman, no.

Q. In this case, though, if—Correct me if I am wrong, this is the person after we entered into our consent decree that this was the first black to be in administration, if I'm not correct? A. I believe you are correct.

Q. Okay, now, I understand the injunction only goes to certain classifications, they tried to do it in a numerical way. But is there any possibility that a new position or this position might be reopened in administration and he could come back? A. I doubt that this position would be reopened in administration.

One of the things that is built into a layoff policy is that when an employee, regardless of his classification, is laid off to the street we, in processing him for layoff, record what his qualifications and experience and those kind of things that he has going for him, so that whenever there is an opening, regardless of whether it is in that classification or not, if the individual who has been laid off from the City has the qualifications to apply for that opening then he will be contacted by our outreach program to come on in on his own initiative to apply for that position.

[16] Q. Well, in this case this man—This man is a lieutenant and you don't have any idea what the administration, whether you are going to have any other lieutenants in administration or not now? A. Basically, Mr. Fields, when the budget is set it is set for the fiscal year.

But the number of positions and the number of slots given the bureau or given the division are identified in the budget process, and for all intents and purposes locked in for that year.

Q. Well, let's say you had another position in administration that would come open or you could make one, or whatever, would this person have a first priority for that even though he is going onto the street rather than on a layoff? A. If he—If there are people laid off in that classification who have bumped out of it they have the right to bump back into it first of all.

If a position comes open in administration and there is no one on the layoff roster to recall, and he has qualifications, then we will reach out to invite him to apply for that position.

Q. But he has to apply, he does not have any bumping rights? A. That's correct, he has bumping rights only back into the previous classification.

[17] Q. So, in effect, what is going to happen, if this scenario goes through, is that the only black that we have been able to get into administration is on the streets, and does not have any priority in coming back into administration if a position reopens? A. That's correct.

MR. FIELDS: All right, thank you.

THE COURT: Mr. Blair?

By Mr. Blair:

Q. Mr. Sabatini, the City prepared a layoff policy on or about May 4, is that corect? A. That's correct.

Q. And it was the City's intent to follow the layoff policy with regard to the Fire Department prior to the Court's order in this case, is that right? A. That's correct.

Q. All right, now, I would like to pass a copy of this to you and see if you can identify this as being a correct copy of that policy? A. It appears to be so.

MR. BLAIR: May I approach the witness?

THE COURT: Yes.

Q. Mr. Sabatini, am I correct that the City intends to [18] follow this policy with regard to the layoffs that are to be made on Friday, June 26th, with the exception of skipping the names of blacks so as to preserve the percentage of blacks in the various classifications pursuant to the Court's order? A. That's what we understand the Court orders to be, and that's what we intend to do, yes.

Q. I would like to ask you this, on page 4 of this agreement, or rather not of this agreement, but of this policy, it does provide, does it not, that a senior employee who is bumping down into a lower classification will have a one time option to bump, which must be exercised within five working days of the notification of layoff? A. That's the way the policy reads, that correct.

Q. Okay, now, as I understood your testimony earlier you have not, at this point, notified the specific employees of either their layoff or their bumping rights, is that correct? A. That's correct—Well, yes, that's correct.

Q. So that if you notify employees, let's say tomorrow afternoon, Wednesday afternoon, the 24th, or Thursday morning the 25th, you are not going to be able to comply with your own policy with regard to the five working days notice? A. Mr. Blair, I can answer that two ways.

We did not notify specifically each employee as it [19] related to the thirty day notice requirement.

We found a system by which it was handled, I think, in a much better way than to notify them individually, because we didn't know who they were apparently.

I would say that during that period of time, since the 28th of May, employees who may have been involved in this particular process, and may be affected as of the 26th, have had a considerable amount of time to think about what their options are.

If we—I would not be in a position right now to advise you as to how we would handle that if we ran into what would be an honest, sincere and genuine problem, what an individual was choosing to do, aside from the five day requirement.

Q. But I am correct that the specific employees who will be laid off or bumped have not been told that they are going to be laid off or bumped, is that correct? A. In

those particular classifications, those specific employees have not been told that.

Q. We are talking about private, driver, lieutenant and inspector? A. That's correct.

Q. And you do intend to notify them on either late tomorrow afternoon or Thursday morning, is that right? A. That's the intent, yes, sir.

[20] MR. BLAIR: Okay.

I believe that's all.

If Your Honor please, I would like to have this marked and move the admission of it.

THE COURT: All right.

MR. FIELDS: I believe it was marked the last hearing.

MR. BLAIR: It was, but I don't know if he has a copy of it here. I just want to make sure it's in the record.

Cross-Examination

By Mr. Fields:

Q. Do you have any other sheets on any other plans with you, Mr. Sabatini? A. Yes, sir, one other.

Q. Do you have copies of them? A. Yes, I do, just one other, and that's—The two that I guess we have been primarily concerned about, the private that is being laid off to the street and the lieutenant classification. Those are the only two that I have.

Q. All right, thank you. A. As you can see, this one also reflects the same.

The circles are the blacks who are in the classification [21] who would be passed over and preserved in that classification.

Going by the seniority plan of the City we would go down thirteen positions, and based on the Court's order we

would go thirty-three positions and preserve the several blacks that are required.

Q. Well, so what is going to happen here, it will be thirteen whites and no blacks? A. No, sir, by the Court order we would go all the way to number thirty-three to make up the—If I'm not mistaken it would be two blacks and fourteen whites, I believe.

Q. Okay. A. (Continuing) So you would have to go all the way to number thirty-three to pick up the fourteenth white.

MR. FIELDS: I see, all right, thank you.

Redirect Examination

By Mr. Britt:

Q. Mr. Sabatini, Mr. Fields was alluding to a black lieutenant in administration that apparently has some problem that he cannot bump back or go back to the Firefighting Department, is that correct? A. That's what I understand.

Q. Do you know if there is also a private in that same position? A. Yes, we had a black private in administration, and [22] we were able, through our placement efforts, to place him in another bureau in the City with finance and administration called the Resource Management.

Q. Was that the fire private or was that the personnel technician? A. May I refer to my notes?

Q. Sure. A. I'm sorry, that was a black male personnel technician that was placed in F and A.

There was a fire private in administration in the same function, Research and Development, as the lieutenant that Mr. Fields referred to, and that private is white, and he is being laid off.

MR. BRITT: That's all I have.

Recross Examination

By Mr. Fields:

Q. Just for the record, he is being laid off or is actually being sent, or he has to retire, isn't he disabled, as

well? A. My notes do not say that to be true. What his condition is I do not know. He may also be one of the—I believe he is a disabled person.

Q. All right, then, that's fine.

[23] By the Court:

Q. Yesterday when you weren't here we had some problem about the computer printout showing seventeen home safety fire representatives, and Mr. Britt being informed that there were only five.

Has anybody asked you about that? A. Yes, sir, I believe that the discrepancy, Judge, is in where the funding of those home fire safety representatives comes from.

There are, I believe, fourteen or maybe fifteen home fire safety representatives who are funded by the Federal Government under the CETA program, and five home fire safety representatives who are funded with City money.

The federal regulations of the CETA program dictate that before you lay off any permanent City permanent position that you must delete all of the CETA positions first. So the figure is right, I think the difference is the matter of funding. There are only five city funded positions.

Q. Is home fire safety or home safety fire? A. My notes say home fire safety, sir.

Q. Well, are you actually laying off twelve CETA positions? A. It is not laying off.

Q. Terminating? A. Terminating.

Q. No more CETA? [24] A. Twelve of them are CETA people. That's true in every classification where we are laying off permanent City employees we must first terminate those CETA employees.

THE COURT: All right, do counsel understand that?

Q. You are terminating all CETA employees and all the City funded employees? A. Yes, sir, that's right, in the home fire safety program that entire function is being absolved.

THE COURT: All right, do counsel understand that?

MR. FIELDS: Yes, sir, I understand that my numbers were correct, it was just a matter of funding.

THE COURT: Well, what do the home fire safety representatives do?

A. This is a function that I think basically it calls on individuals' homes, and maybe some establishments also, to counsel people. It doesn't get into the actual inspection, but more the educational process or conditioning process for good safety practices.

THE COURT: All right, thank you, Mr. Sabatini, you have been helpful to the Court, and I appreciate it.

THE WITNESS: You are welcome.

THE COURT: I'm going to sign the order. It won't get filed until in the morning. It is all [25] right with me, you can mark it filed in court.

And it seems to me that things are reasonably explainable.

I'm not too concerned about when the time—I have known all along that there was a problem of whenever you decide who you are going to layoff, to find out who had quit or who had left for any one of the reasons, whether you do it early or late, that's still a problem. And I think it is to the City's best interest to take advantage of all people who had an opportunity to resign so that they didn't have to lay off somebody.

The order still provides that the Court will be available until two o'clock.

I have not been persuaded that the Court should intercede in these two areas that we reserved. I don't know whether Mr. Fields wants to put on some more proof.

MR. FIELDS: Your Honor, I can put it on now or Friday at two o'clock. I have the lieutenant here ready to testify what his function is and how that will be.

THE COURT: All right, let's put him on now.

MR. FIELDS: All right, Mr. Tate.

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TRANSCRIPT OF ORAL RULING OF THE COURT ON JUNE 23, 1981

[41] THE COURT: All right, the motion is granted, it will be a notice by Friday, or in time for them to make their election.

I would like to say that this matter was not put in any motion or anything, it came up as an afterthought on cross-examination, it was beyond the scope of direct examination, and it is just an obstacle that is being tried to be put in the way of the layoffs.

[42] Now, I didn't call for the layoff, but I'm certainly not going to be a vehicle to get in this dispute between the Union and the City as to whether or not they can do it, and that's the only purpose of it.

I'm prepared to find, from Mr. Sabatini's testimony, that reasonable notice has been given to these people that there were going to be some choices to be made.

I'm sorry it came down to the last minute, but it did.

Also, I want to make this observation and this holding. On the home fire safety representatives, now that I know that those are CETA employees, and everybody that is a City employee has known for a long time that there was not going to be any more CETA. That's not all the City Council's fault, but there is no more CETAs.

I do recall that in earlier testimony in this case it was described how these procedures were or these jobs were gone into, and what they could do, and it was a judgmental evaluation. I don't find it unreasonable to do away with this home safety fire, or fire safety representative, whose duties are not the same as going out and fighting fires.

[43] And I don't find anything racial about that, it was a judgmental decision that is not established to be motivated by race.

With regard to Mr. Tate, I'm very sorry for Mr. Tate. He is in a category where the City for years has had the problem of what to do with somebody who has been injured in his work and they don't know what to do with him. They found a job for him, and it apparently was a manufactured job.

I do not think it would be appropriate for this Court to tell the City that he should be transferred from that to some other job in the broad category of administration.

I hope they can find something for him in another area, but, once again, this policy I think is and always has been the same for blacks and whites.

I'm sorry for him, and of course this is a tough decision that the City officials have to make. And a lot of them are tough, because all of them who get laid off are going to be out of work, who ultimately get laid off.

Now, they are tough decisions, but you must remember that these are non—This is none of my business, unless there is some racial discrimination. And I don't think we ought to get collateral matters [44] into this hearing so that this Court is blamed for trying to determine what duties should be assigned to people, as long as they are not discriminatory.

Now, the fact that it affects blacks more than whites, in the first place a pretty good argument can be made for the overall effect that we have been trying to preserve what the blacks fought so hard to accomplish. And in the process some blacks are going to have to be laid off. Now, I'm sorry, but we have done the best we can.

I will still be here Friday in case there are some problems that we are not now aware of, but as far as I am concerned you can have an order approving the disposition of the whole category of home fire safety representatives, and the Research and Development lieutenant.

And I don't know that anything else is unresolved, the previous order took care of the Court's other ruling on these five categories that were brought up in the motion.

MR. FIELDS: Your Honor, the only thing that may be unresolved will be after we have had a chance to look at it.

THE COURT: Well, I will be here Friday, I've [45] got plenty to do, and I certainly won't miss you if you don't get here, I will put it that way.

Mrs. LeFon, you may adjourn court.

(ADJOURNMENT)

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Reproduced in Petition for Certiorari of Union and City at A.1)

(Filed May 7, 1982)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 81-5348/49

CARL W. STOTTS, Individually and on behalf of all others similarly situated, and FRED L. JONES,
Plaintiffs-Appellees,

vs.

MEMPHIS FIRE DEPARTMENT; ROBERT W. WALKER, CITY OF MEMPHIS, and JOSEPH SABATINI,
Defendants-Appellants (81-5348),

FIREFIGHTERS LOCAL UNION 1784,
Defendant-Intervenor-Appellant (81-5349).

Before: KEITH and MARTIN, Circuit Judges and DUNCAN, District Judge.

JUDGMENT

APPEAL from the United States District Court for the Western District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of

the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiffs-Appellees recover from Appellants the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

[Statement of Costs Omitted in Printing]

Office - Supreme Court, U.S.
FILED
OCT 18 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 82-206 and 82-229

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MEMPHIS FIRE DEPARTMENT and
FIREFIGHTERS LOCAL UNION NO. 1784,

Petitioners,

v.

CARL W. STOTTS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

Nos. 82-206 and 82-229

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MEMPHIS FIRE DEPARTMENT and
FIREFIGHTERS LOCAL UNION NO. 1784,

Petitioners,

v.

CARL. W. STOTTS, et al.,

Respondents.

==========

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

==========

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This case presents questions concerning the modification of a consent decree in an employment discrimination lawsuit.

In 1977, respondent Carl W. Stotts filed a class action lawsuit against the City of Memphis, alleging that the Fire Department's hiring and promotion policies were racially discriminatory. Following three years of discovery and negotiations, the lawsuit was settled by the entry of a consent decree.

The consent decree was agreed to by a class of black employees of the Memphis Fire Department and the City of Memphis and approved by the district court on May 27, 1980. The express purpose of the consent decree was "to remedy the past hiring and promotion practices of the Memphis Fire Department with respect to the employment of blacks[1/] and [to] continue[ing] the efforts

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1/ Petitioners correctly state that there was no finding of liability on the part of the Memphis Fire Department in the consent decree. They fail to note, however, that the undisputed statistical evidence before the district court created such a strong prima facie case of racial discrimination that the court took judicial notice of the discriminatory prac-

made by the City in hiring and promotions under the consent decree entered in CA-74 -286."[2] A. 64.[3] In order to accomplish

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1/ continued

tices of the City. A. 21. See also A. 9-11, 70-71 for hiring and promotional statistics showing that blacks remained seriously under-represented in job classifications above the rank of private in 1981. Also before the court were depositions of black firefighters detailing other discriminatory employment practices in disciplinary treatment, training opportunities, and station segregation by race.

2/ In 1974 the City of Memphis and the U.S. Department of Justice entered into a consent decree resolving issues raised in a lawsuit which had alleged discrimination on the basis of race and sex in hiring and promotion within the various divisions of city government. In this decree the City committed itself to an interim goal of filling at least fifty percent (50%) of all vacancies with qualified black applicants and meeting exactly the same long term goal of achieving a proportional representation of blacks in each job classification as in the 1980 decree.

3/ "A." refers to the appendix filed by the petitioner Firefighters Local Union No. 1784 in No. 82-206. We are filing a consolidated brief in opposition to certiorari pursuant to the Clerk's approval in his letter dated August 30, 1982. We, therefore, will only refer to the appendix filed in No. 82-206 unless otherwise noted.

this purpose the Fire Department agreed inter alia to the long term goals of "rais[ing] the black representation in each job classification in the fire department to levels approximating the black proportion of the civilian labor force in Shelby County." A. 64. Moreover, the district court expressly retained jurisdiction of the case "for such further orders as may be necessary or appropriate to effectuate the purposes of this decree." A. 69.

In April of 1981, the City experienced an unanticipated economic crisis that required layoffs and demotions in city departments. A layoff policy was formulated that provided: (1) the Mayor of Memphis had absolute discretion in approving or not approving the job classification to be eliminated; (2) affected employees in these job classifications were to be laid off or reduced in rank according to their city-wide seniority; (3) under the

the policy certain employees whose positions were being eliminated possessed "bumping" rights whereby employees with sufficient seniority could choose to temporarily assume a lower ranking position rather than go on layoff status, and (4) excess employees who had been "bumped" could exercise their seniority resulting in the least senior employees being laid off. It is undisputed that "the application of the layoff policy to the [Fire Department] job classifications selected by the City would have virtually destroyed the progress belatedly achieved through affirmative action."[4/] A. 32.

After respondents applied for and were granted a temporary restraining order re-

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4/ For example, both courts below found that approximately 55% of black lieutenants and 46% of black drivers would either have been laid off or demoted if the City's layoff policy was applied. A. 9. These were the job classifications where blacks had made recent gains after years of virtual exclusion. See A. 9-11, 37.

straining the City from laying off or reducing in rank any black employee in the Memphis Fire Department, the district court held an evidentiary hearing and enjoined the City in orders issued on May 8, 1981, and June 24, 1981, from implementing any layoff policy based upon seniority insofar as it would decrease the percentage of blacks in 7 job classifications in the Memphis Fire Department.[5/] The City then proposed and the district court

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5/ The Union appealed only from the injunction entered on May 8, 1981, since the additional reductions enjoined on June 25, 1981 affected only employees who are not represented by the Union.

It is respondent's position that the Union's seniority provision in the Memorandum of Understanding (A. 80-82) is void and unenforceable under Tennessee law. Although the Sixth Circuit did not decide this issue (Pet. App. 38), the Union continues to seek to enforce the seniority provision in its petition. Subsequent to the Sixth Circuit's opinion on May 7, 1982, respondents discovered that Local 1784 argued that the Memorandum of Understanding is illegal and therefore a third party could not sue the Union for damages as a result of a 1978 strike by the Union. The Tennessee Court of Civil Appeals

approved layoffs and demotions that included a proportionate number of blacks and whites.[6/]

Both the City and the Union appealed, and the Sixth Circuit affirmed the judgment of the district court in modifying the consent decree in order to obtain its stated purpose and to preserve black representation in the Fire Department.

5/ continued

upheld the Union's position in Fulenwider v. Firefighters Association Local Union 1784, ____ S.W.2d ____ (Tenn. App. 1981). See also City of Chattanooga v. Chattanooga Firefighters Ass'n Local 820, ___ S.W.2d ____ (Tenn. App. 1980); Jackson Transit Authority v. Local 1285, 50 U.S.L.W. 4603 (June 7, 1982). The Union should therefore be precluded from arguing the enforceability of its contractual rights when it has taken a prior inconsistent position. See 1 B Moore's Federal Practice ¶ 0.405[8] at 765-55 (2d ed. 1974).

6/ The total number of employees laid off and demoted were 72 whites and 8 blacks. All laid off employees were reemployed by November 1981. The Fire Department made new promotions in June 1982 and expects to hire a new class of 30 firemen in the late fall of 1982.

REASONS FOR DENYING THE WRIT

The petitioners state the question presented in terms of the abrogation of a bona fide seniority system where no finding of discrimination has been made. The district court and the Sixth Circuit, however, considered these subsidiary issues in the decisions below and instead defined the issue as the extent of a court's power to enjoin layoffs and demotions that would drastically impair the relief mandated by the consent decree. We therefore respectfully assert that the question presented is:

> Whether a district court has exceeded the limits of its power to modify a consent decree to prevent minority employment from being affected disproportionately by unanticipated layoffs and demotions and thus preserve the level of benefits procured through the decree?

I. The Decision of The Sixth Circuit, Modifying The Consent Decree, Is Consistent with The Decisions of This Court And Other Circuits.

The Court of Appeals has written a

thorough opinion that relies on the power of the Court to enjoin a layoff and demotion policy based upon seniority that conflicts with the Fire Department's duty under a consent decree to remedy serious black under-representation. In doing so the Court's opinion is consistent with opinions in other recent cases in which this issue was presented.[7/] Petitioners argue that this Court has not decided the issue of how a bona fide seniority system can be modified to maintain gains made under affirmative action plans or decrees, yet in Franks v. Bowman Transportation Company, 424 U.S. 747 (1976), seniority was not found to be immutable under 703(h) but was subject to alteration in the collective bargaining process:

> The Court has also held that a collective bargaining agreement may

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7/ See Boston Chapter NAACP v. Beecher, 679 F.2d 965 (1st Cir. 1982), cert. pending; Morgan v. O'Bryant, 671 F.2d 23 (1st Cir. 1982), cert. denied, ___ U.S. ___; Brown v. Neeb, 644 F.2d 551 (6th Cir. 1981).

> go further, enhancing the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). And the ability of the union and the employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of the highest priority, is certainly no less than in other areas of public policy interest.

424 U.S. at 778. See also, Tangren v. Wackenhut Services, Inc., 658 F.2d 705 (9th Cir. 1981), cert. denied 50 U.S.L.W. 3802 (April 5, 1982).

In this case a municipal employer who had sole authority[8/] to determine the method of layoff and demotion, voluntarily entered into a consent decree that mandated affirmative relief to a class of black employees and appli-

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8/ See fn. 4, supra.

cants. By adopting a seniority-based layoff policy, the Fire Department acted contrary to the purpose of the consent decree: remedial hiring and promotion of black employees to remedy the past hiring and promotion practices of the Memphis Fire Department. Under such circumstances the district court's holding correctly exercises the court's authority to insure that its Orders, whether entered by consent or not, are obeyed, and their purposes achieved. United States v. Swift and Company, 286 U.S. 106 (1932); United States v. United Shoe Machinery Company, 391 U.S. 244 (1968); King Seely Thermos Company v. Alladin Industries, Inc., 418 F.2d 31 (2nd Cir. 1969); EEOC v. Plumbers & Pipefitters, Local 189, 438 F.2d 408 (6th Cir. 1971); United States v. Hall, 472 F.2d 261 (5th Cir. 1972).

It should be recalled that the section of Title VII which accords a measure of immunity to bona fide seniority systems, § 703(h), merely helps define what is and what is not a

violation of the Act. Franks v. Bowman, 424 U.S. 747, 758 (1976). Thus, in every case in which this Court ruled regarding a seniority system that is claimed to be bona fide, it was addressing the question of whether or not a violation of the Act has been established. See Teamsters v. United States, 431 U.S. 324 (1977); California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980); American Tobacco Co. v. Patterson, ___ U.S. ___, 102 S.Ct. 1334 (1982); Pullman Standard v. Swint, ___ U.S. ___, 102 S.Ct. 1781 (1982). Here, we are concerned with the question of whether or not a remedial order may require departures from the routine operation of an arguably bona fide seniority system. Where the contours of such remedial orders are involved this Court has repeatedly approved alteration of those seniority rules. See Franks v. Bowman, supra, and Zipes v. TransWorld Airlines, ___ U.S. ___, 50 U.S.L.W. 4238 (February 24, 1982).

See also, Morgan v. O'Bryant, 671 F.2d 23 (1st Cir. 1982), cert. denied, ___ U.S. ___. In temporarily modifying a consent decree by altering a seniority-based method, the district court did the minimum necessary to maintain the status quo for gains made under the provisions of the 1980 decree. The district court's proportional layoff and demotion order "does not require the discharge of white employees and their replacement with new black hires." United Steelworkers of America v. Weber, 443 U.S. 193 (1981). Rather, when a reduction in force is necessary it requires that black employees will remain at specific levels in the Fire Department until the ultimate goal of the consent decree is attained: representation of blacks in each job classification in proportion to their numbers in the labor force. Seniority is only modified to the extent that blacks do not suffer disproportionately from the layoffs.

II. The Decision of The Court of Appeals Is Supportive of The Congressional Policy Encouraging Settlement In Employment Discrimination Litigation.

Both the district court and the Court of Appeals sought a modification of the decree which would allow the City to proceed with its layoff policy, subject only to a reasonable deference to its obligations under the decree. In so doing, the district court, working within the context of a voluntary agreement, the implementation of which it had overseen and ordered, achieved a modification which partially alleviated the City's fiscal constraints, while protecting the integrity of the court's order.

Such a procedure, particularly in the face of changed and unforseen circumstances is in no way likely to inhibit the future use of consent decrees in Title VII litigation. First, the entire thrust of the district court's modification was to insure that the purpose of the decree, as explicitly stated

in the decree, was fulfilled.[9] Second, the parties to the decree explicitly indicated the continuing jurisdiction of the court to issue" ... such further orders as may be necessary or appropriate to effectuate the purposes of this decree".[10] This can only be interpreted as acknowledging the power of the court to modify the decree and to grant additional relief not embodied in the decree, if it were necessary in order to obtain the purposes of the decree.[11]

It follows that in this instance the court, faced with an action which threatened to both violate the decree and nullify its past effects, appropriately moved to protect the integrity of its orders, as a court of equity may, whether or not the power to modify

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9/ See, Consent Decree § V., A64.

10/ See, Consent Decree § VII., A69.

11/ Roberts v. St. Regis, 653 F.2d 166, 172 (5th Cir. 1981).

the injunction is reserved by its terms. United States v. Swift and Company, supra.

Far from inhibiting settlements, actions such as these which consider the concerns of all parties and the purpose and context of the agreement,[12] insure that a consent decree pursuant to Title VII may, if necessary, be modified fairly to maintain its integrity while balancing the interests of the parties.[13]

12/ See e.g., United States v. ITT Continental Baking Co., 420 U.S. 223, 238 (1975); Eaton v. Courtaulds of North America, Inc., 578 F.2d 87, 91 (5th Cir. 1978).

13/ The petitioners argue that the modification of the consent decree if allowed to stand would undermine incentives for settling employment discrimiation cases where seniority rights are at issue. Yet one of these petitioners, the City of Memphis, approved a consent decree governing its utility division that included this provision:

> (c) Defendants agrees that, in the event of layoff or reduction in force, all reasonable steps will be taken to minimize the effect of such actions on the achievement of the goals of this Decree. MLGW shall notify counsel for the plaintiffs forty-five (45) days in advance of

CONCLUSION

For all the foregoing reasons, the

13/ continued

> any proposed layoff or reduction in force, specifying those persons, by race and sex, to be affected by such action, whether to transfer, demotion, layoff or termination; and specifying the effect of the actions on the achievement of the long-term goals of the Decree. If such action will have a significant adverse effect o black or female employment in those areas subject to interim goals, MLGW shall indicate what alternatives to layoff or reduction were considered and the reason for rejection of these alternatives. If counsel for government or private plaintiffs object to the proposed action of MLGW, the parties shall meet prior to implementation of the proposal to attempt to resolve the disagreement. If agreement cannot be reached, the matter may be referred to the Court for resolution.

U.S. & Armmer v. Memphis Light, Gas & Water Division (MLGFW), Civil Action Nos. C-74-286, 74-17 (W.D. Tenn.), Amended Consent Decree entered November 14, 1980. Unlike the Fire Department where no layoffs or demotions had been made or even discussed prior to 1981, MLGW had considered layoffs in 1976 when the initial consent decree was entered into. See also, Tangren, supra.

petitions for a writ of certiorari should be denied.

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Nos. 82-206 and 82-229

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OCTOBER TERM, 1982

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Petitioners,

v.

CARL W. STOTTS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' SUGGESTION OF MOOTNESS

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RESPONDENTS' SUGGESTION OF MOOTNESS

Respondents respectfully suggest that, in light of the decision of this Court in *Boston Firefighters Union* v. *Boston Chapter, NAACP*, Nos. 82-185, 82-246, and 82-259, this case should be vacated and remanded to the Sixth Circuit with instructions to consider whether this appeal is now moot.

This case, like *Boston Firefighters*, concerns the standard to be used in selecting the public employees to be laid-off during a city fiscal crisis. But in Memphis, as in Boston, all the employees previously laid-off have since been recalled to work. (See attached News article, paragraph 4). Of the Memphis fire officers who were temporarily demoted due to the city's financial difficulties, all but one have been returned to their pre-July 1981 rank, and that officer was unaffected by the district court's injunction for he had the lowest seniority of any fireman, black or white, in the job classification of In-

spector. The City's budget for fiscal year 1984 which begins on July 1, 1983, makes provision for three (3) new inspector positions, so the fireman should be returned to his original rank.

The controversy once presented in this case has therefore become moot as a result of the reinstatement of all firemen terminated and demoted pursuant to the City's 1981 layoff policy as modified by the District Court, and as a result of the City's resumption of hiring new officers. Given the fact that the City does not anticipate layoffs or demotions in the future, there is no expectation that the circumstances giving rise to the District Court's order will occur again.

For these reasons, as with *Boston Firefighters*, this case should be vacated and remanded for determination of the mootness issue.

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Layoff Suit Is Set Aside By Justices

By MARY DEIBEL
From The Commercial Appeal
Washington Bureau

WASHINGTON — The U.S. Supreme Court Monday sidestepped the most controversial civil rights issue before it this term by deciding not to rule if Boston could protect the jobs of newly hired minority workers when the city faced a financial bind that made layoffs necessary.

In an unsigned opinion, the justices sent the suit back to a lower court, saying the case may no longer be alive since Boston has reinstated all the veteran white police and fire fighters who had filed the complaint.

A similar lawsuit involving Memphis still is before the high court, which decided to hold Memphis until a ruling was reached in the Boston case.

Monday's action did not make it immediately clear what the court would do regarding Memphis, although Louis Britt, attorney of record for the city, said he expected the high court would decline to hear the case since all employes have been called back to work.

Like Boston, Memphis had entered into a consent agreement in federal court in the mid-1970s when municipal officials promised to improve the city's record of minority recruitment, hiring and advancement.

Both cities also set goals for themselves of bringing minority representation in their police and fire departments to a level on a par with minority participation in the local labor force.

Boston and Memphis also both ran into budgetary trouble in the early 1980s, and the layoffs those problems brought on also brought about problems with the consent agreement. Because the court orders hadn't foreseen the possibility of layoffs, judges were asked to modify their decisions to protect minority gains.

Challenges to those changes were brought in both cities by municipal employe unions, which contended the court orders were being carried out unfairly at the expense of white police and fire fighters with more seniority.

The justices, in their opinion Monday, appeared convinced by arguments in April that the Boston case was legally dead because all the officers were rehired and because a new Massachusetts law bars any future such reductions in force.

"In light of these changed circumstances," the justices said they were setting aside the First U.S. Circuit Court of Appeals ruling supporting the layoffs. The high-court opinion also ordered the case returned "for consideration of mootness."

Although all the Memphis police and fire fighters are back on the job, Tennessee has no new law comparable to Massachusetts' layoff ban. Also, Tennessee law does not recognize the right of municipal workers to organize in labor unions.

In the Boston case the unions had urged the court to decide the case even though the workers were called back because of salary and seniority losses suffered during the layoffs and because of the possible effect on future promotions.

The NAACP, which brought the first suits in 1972 in behalf of unsuccessful applicants for jobs with Boston's fire department and police force, contended the issue was dead because there will be no more layoffs in Boston.

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Petitioners submit that respondents have failed to sustain their heavy burden of demonstrating mootness in the instant case. *See United States v. W. T. Grant Co.*, 345 U.S. 629, 632-633 (1953).

Respondents contend that this appeal should be remanded for consideration of mootness in light of the Court's per curiam opinion in *Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP*, ... U.S. ....., 51 U.S.L.W. 4566 (1983). Respondents argue that, as may be true in *Boston Firefighters*, the instant case has become moot on the basis that all employees adversely affected by the July, 1981 layoffs have been recalled to work and reinstated to their former positions.

An examination of the per curiam opinion in *Boston Firefighters* reveals that the grounds in that case for potential mootness are not present herein. The opinion in *Boston Firefighters* remanded that case for consideration of moot-

ness in light of a Massachusetts statute enacted subsequent to the 1981 Boston layoffs. This statute (1982 Mass. Acts, Ch. 190, §25) had the effect of:

> providing the city of Boston with new revenues, requiring reinstatement of all police and firefighters laid off during the reductions in force, securing these personnel against future layoffs for fiscal reasons, and requiring the maintenance of minimum staffing levels in the police and fire departments through June 30, 1983.

..... U.S. at ....., 51 U.S.L.W. at 4566. This statute protects Boston firefighters and policemen from the potential of layoffs for fiscal reasons. The Court referred to this statute as constituting the "changed circumstances" referred to in the Court's opinion.

The Court's per curiam opinion in *Boston Firefighters* draws from the principle, established firmly in the decisions of the Court, that intervening legislation may render an appeal moot where the legislation resolves the controversy at hand. *See, e.g., Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 465 (1982); *United States v. New Jersey State Lottery Comm'n*, 420 U.S. 371 (1975). While the Massachusetts statute may render the controversy moot in *Boston Firefighters*, there is no corresponding legislation on the state or local level in the instant case which would resolve the controversy before the Court. The employees of the Memphis Fire Department have no assurances against future layoffs for fiscal reasons. There are no "changed circumstances" in this case of the nature referred to in the Court's per curiam opinion in *Boston Firefighters*. For this reason, it would be inappropriate to remand this appeal for consideration of mootness.

Neither is the instant case moot, as respondents suggest, for the reason that all firefighters who were laid

off or demoted in rank have been rehired and returned to their previous positions. The parties to this action have no assurance that the circumstances giving rise to the District Court's order will not occur again. *Cf. County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). Respondents' suggestion to the contrary is entirely speculative and is based upon statements of fact that appear absolutely nowhere in the record.

At a time when municipalities are experiencing all manner of highly-publicized financial problems, there is no guarantee that Memphis will not be forced to impose layoffs for fiscal reasons in the future. The circumstances of the instant controversy belie respondents' assertion that there can be no expectation of future layoffs. As proof of the highly speculative nature of respondents' predictions, petitioners would point to the fact that in April, 1980, none of the parties to the consent decree anticipated layoffs which became necessary in May, 1981. *See Stotts v. Memphis Fire Department*, 679 F.2d 541, 563 (6th Cir. 1982).

There is no question that this case, a certified class action, clearly presented the District Court and the Court of Appeals with a case or controversy in every sense contemplated by Article III of the Constitution. *See Franks v. Bowman Transportation Co.*, 424 U.S. 747, 755 (1976). Those courts were presented with the instant controversy in an adversary context and in a form historically viewed as capable of resolution through the judicial process. *Id.* The single remaining inquiry regarding mootness is whether, in the face of the rehiring and reinstatement in rank of those firefighters affected by the 1981 layoffs, a "live" controversy remains at the time the Court considers the instant case. *Id.*

Petitioners would show that a live controversy still exists under the analyses utilized by the Court in prior

cases. The parties to this appeal retain a legally cognizable interest in the outcome. *See Powell v. McCormack*, 395 U.S. 486, 496 (1969). Unlike *Boston Firefighters*, the members of the respondent class, the municipal petitioners, and the union petitioners continue to be involved in a minority employee-employer-labor representative relationship in which the potential against future layoffs has not been assured by statute or otherwise. Each party faces the potential for a repetition of the 1981 layoff scenario in which the continuing effect of the District Court's preliminary injunction would present a key issue.

While it may be urged that the order of the District Court in *Boston Firefighters* is a dead letter due to the subsequent enactment of the Massachusetts statute, the Order Granting Preliminary Injunction (*see* City and Union Petitions at A.77-79) and Order Expanding Preliminary Injunction (*see* City's Petition at A.82-83) have not been mooted by subsequent legislation and continue to enjoin seniority-based layoffs according to their terms. As the injunctions conflict with the bona fide seniority system otherwise in place, each of the parties to this appeal retains a legally cognizable interest in the outcome. As shown herein, the parties to this appeal retain such a stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court depends for elimination of difficult questions. *See Franks, supra*, 424 U.S. at 755 (1976).

As the orders below have not expired by their own terms or become moot by operation of statute, it cannot be said with certainty that there is no reasonable expectation that the orders of the District Court have no continuing effect. *Cf. County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). Respondents' speculation that future layoffs are not foreseeable fails to sustain their "heavy"

burden of demonstrating mootness. *Id.* The municipal petitioners cannot provide assurances that further layoffs for fiscal reasons will not be necessitated during the effective period of the consent decree in this matter, nor would the petitioner union be satisfied with such assurances if given. Rather, the orders of the District Court impose a continuing obligation that is susceptible of review by this Court. *See J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 334 (1944).

The decisions below have an adverse effect on the petitioner City in that the District Court's orders, as affirmed, continue in effect. The District Court retains continuing jurisdiction to effectuate the consent decree and thereby override petitioner's established personnel policies. As the decree is presently interpreted by the District Court, any future layoff actions by petitioner City will be controlled by the orders herein. The City is therefore caught between the conflicting dictates of the present injunction and the City's personnel policy in favor of layoffs based on seniority.

Also, the adverse impact of the 1981 layoffs continues to affect those employees who were laid off or reduced in rank. During the period white firefighters were laid off, black firefighters with equal or less seniority continued to accumulate seniority while their white counterparts did not. One effect of the layoffs has been to render these white firefighters less senior for purposes of future job decisions and entitlements. For instance, those previously laid-off firefighters have a lessened expectation of future promotion, in which seniority is a relevant consideration. Also, those firefighters entitled under municipal charter to promotion to captain after 30 years' service (City of Memphis Charter, §67) will be delayed in the realization of this entitlement as a result of their layoff. Other continuing adverse impacts of the layoffs at issue herein

include loss of comparative seniority for purposes of future layoffs and a decreased priority in bidding on certain jobs and job transfers for affected personnel. (*See* Union Petition at A.80-81.) These and other adverse effects[1] of the underlying orders herein continue to impact the previously laid-off members of the union petitioners, in addition to their loss of pay during the period of the layoffs.

If the Court should otherwise conclude that the instant controversy is now moot, this appeal remains "live" by virtue of the fact that the underlying dispute among the parties is one "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498, 515 (1911). Due to their subject matter, the primary effect of the orders of the District Court could be expected to dissipate during the normal time required for the resolution of the controversy. *See Sosna v. Iowa*, 419 U.S. 393, 402 (1979). As is the case herein, attrition in the ranks of department personnel (through retirement, discharges, resignations and the like) would enable a typical municipality to reinstate previously laid-off employees during the interim prior to review by this Court. The instant controversy is capable of repetition in that there are no statutory assurances against future layoffs as in *Boston Firefighters*. Also, the underlying injunctions continue in effect. Therefore, the important policy issues posed by this appeal may evade review should the Court remand this case as respondents suggest.

In conclusion, the respondents have failed to carry their "heavy burden" of demonstrating mootness. This controversy has not been mooted as a result of changed

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1. Those firefighters who were reduced in rank also continue to suffer continued adverse effects. While reduced in rank, those more senior white firefighters lost their opportunity to take examinations for the purpose of securing promotions to the next higher rank.

circumstances by intervening legislation or otherwise. In fact, a live controversy still exists. Petitioners retain a legally cognizable interest in the outcome of this case as they suffer continuing adverse impact as a result of the orders below. The orders below remain in effect under their own terms. Respondents have failed to demonstrate that assurances can be made that there is no reasonable expectation of future layoffs. Finally, this dispute may be characterized as one "capable of repetition, yet evading review." Petitioners respectfully submit that the respondents' suggestion of mootness should be rejected and a writ of certiorari should be granted so that the Court can consider this controversy on the merits.

Respectfully submitted,

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No. 82-206

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FIREFIGHTERS LOCAL UNION No. 1784,
Petitioner,

v.

CARL W. STOTTS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AMICUS CURIAE, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, IN SUPPORT OF PETITIONER

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IN THE

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BRIEF OF AMICUS CURIAE, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, IN SUPPORT OF PETITIONER

THE INTEREST OF THE AMICUS CURIAE

The International Association of Fire Fighters, AFL-CIO files this brief, *amicus curiae*, in support of Petitioner Firefighters Local Union No. 1784, pursuant to Rule 36 of the Rules of the Supreme Court.[1] The International Association of Fire Fighters, AFL-CIO (IAFF) is an unincorporated association comprised of federal,

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[1] All parties consented to the filing of this brief. Copies of written consents have been filed with the Court.

state, and municipal fire fighters throughout the United States and Canada. The current membership includes approximately 153,000 state and municipal fire fighters employed by states, cities, and towns across the U.S. The IAFF's objectives include promoting and securing improved wages, hours, and working conditions of fire fighters through collective bargaining, legislation, legal action, and other appropriate means.

The IAFF wishes to represent the interests of its members across the country who are facing, or may face, the prospects of recession-induced layoffs such as those which were proposed by the City of Memphis and who are employed pursuant to collectively bargained seniority systems. The prospects of reductions-in-force in these jurisdictions are not merely conjectural.

In a report issued by the Bureau of National Affairs, figures released showed that layoffs of state workers occurred in fiscal year 1981 in 43 of the 50 states, while in fiscal year 1982, 44 states either experienced layoffs or anticipated them by the end of the year. "Layoffs, Rifs, and EEO in the Public Sector, A BNA Special Report," *Government Employee Relations Report*, GERR, No. 949, February 8, 1982, pp. 13-15. The financial situation among local governments indicates a similarly stark outlook. In a survey of 100 cities, 62 have laid off or were expecting to lay off employees in fiscal year 1982. Many of these cities have collective bargaining agreements with seniority-based layoff provisions in effect covering their fire fighter employees. Like Memphis, many cities have also entered into consent decrees to settle employment discrimination lawsuits. *Government Employee Relations Report*, *supra*, at 23-36. There is no indication that the financial problems of state and local governments will significantly improve in the near future, and the prospects for continued reductions-in-force remain substantial.

The IAFF has a major interest, then, in the Petition for Writ of Certiorari previously filed by Petitioner, Firefighters Local Union No. 1784, and offers this brief as *amicus curiae* to request that the Petition for Writ of Certiorari be granted.

SUMMARY OF ARGUMENT

In affirming the District Court's modification of a consent decree previously entered into by the City of Memphis and minority employees in settlement of an employment discrimination suit, the Court of Appeals for the Sixth Circuit directed the layoff of employees contrary to the provisions of a bona fide seniority system which had been agreed to by the City and the fire fighters union. The decision of the Sixth Circuit failed to apply the principles established by this Court that absent a discriminatory purpose, the routine application of a seniority system is not invalid, even though it may result in certain discriminatory consequences. Further, the lower courts' decisions award superseniority to minority employees even though those employees are not identified victims of racially discriminatory employment practices. Because the decisions of the courts below fail to properly consider these and other principles involving the statutory protection afforded bona fide seniority systems or employment practices, the petition for writ of certiorari should be granted.

ARGUMENT

The Petition Should Be Granted Because the Decision Below Disregards Principles Established By This Court Concerning The Special Protection That Is Afforded Bona Fide Seniority Systems In The Context Of Employment Discrimination Suits.

In a broad pronouncement, the Sixth Circuit held that a District Court does not abuse its discretion when it modifies a consent decree in a manner which directly conflicts with the provisions of a bona fide seniority system contained in a collective bargaining agreement. *Stotts v. Memphis Fire Department*, 679 F.2d 541 (6th Cir. 1982).[2] The City of Memphis was faced with an economic crisis. It proposed to reduce its firefighting force via layoffs in accordance with the routine application of the "last-hired, first-furloughed" provisions of its agreement with the firefighters union. This action would have caused minority employees hired pursuant to a consent decree temporarily to lose their jobs. The District Court determined that this would frustrate the purpose of the consent decree to increase minority hiring and promotions. It therefore modified the decree to enjoin layoffs in accordance with seniority. The Sixth Circuit approved. This decision flies in the face of the protection Congress afforded bona fide seniority systems under Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h).

The decisions of this Court have repeatedly emphasized the "overriding importance" of seniority provisions in collective bargaining. *American Tobacco Co. v. Patterson*, 456 U.S. ——, 71 L.Ed. 2d 748, 760 (1982) (quoting *Humphrey v. Moore*, 375 U.S. 335, 346 (1964)). Such provisions are "universally included" in collective bargaining agreements. In enacting the Civil Rights Act of

[2] The Sixth Circuit held that the District Court erred in ruling that the seniority system was not bona fide. *Stotts*, *supra*, 679 F.2d at 551, n.6.

1964, Congress was fully aware of the importance and extent of seniority systems in collective bargaining agreements between employers and representatives of employees and afforded bona fide systems "special treatment under Title VII itself." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1977). As this Court explained in *International Brotherhood of Teamsters v. United States*, 421 U.S. 324, 352 (1977), "the unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII."

The court below, however, gave little more than lip-service to this Court's seniority system decisions. Instead, it held that the bona fide seniority system provisions could be overridden "where [seniority-based] layoffs caused by an unanticipated economic crisis threatens to frustrate the basic purpose of a Title VII consent decree." *Stotts, supra*, 679 F.2d at 563. The purpose of the consent decree entered into by the Plaintiffs and the City in 1980 was to remedy past hiring and promotion practices of the City relative to minorities, and was intended to supplement a similar decree entered in 1974. At the time the District Court modified the decree to prohibit layoffs in accordance with seniority, it made no determination that the City had failed to take the necessary steps to comply with the decree. Nor has such a finding been made on appeal. Thus, the remedial action ordered by the courts below enjoining the City's legitimate response to an unanticipated fiscal emergency far exceeds the remedial purposes of the consent decree. The alleged wrong to be remedied by the 1980 decree was the City's *hiring* and *promotion* policies, not its seniority system. Nevertheless, it is its seniority system which has been trammelled.

The scope of a district court's remedial powers under Title VII of the Civil Rights Act of 1964 is determined by the purposes of that Act. This Court has noted that "a

primary objective of Title VII is prophylactic: "to achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees." *International Brotherhood of Teamsters v. United States, supra*, 431 U.S. at 364. Those barriers have been removed through the City's continued compliance with the consent decree, and thus, the primary objective of Title VII has been attained.

Nevertheless, the Court of Appeals' affirmance of the District Court's order approves what is, in effect, a grant of retroactive or superseniority to minority firemen in contravention not only of the procedures contained in the bona fide seniority system, but also of the original decree itself.[3] It no longer can be disputed that an award of retroactive seniority to identified victims of discriminatory employment practices is proper. *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976). But here there has been no adjudication that the City has committed any violation of Title VII, either in determining that a reduction in personnel was necessary or in any other way.[4] Thus, there are no identified victims of discriminatory practices to be accorded such seniority relief under *Franks*.

More importantly, it is well-settled at this point that Section 703(h) immunizes bona fide seniority systems from attack. Absent a discriminatory purpose, the operation of a seniority system that has some discriminatory consequences is not unlawful. *Trans World Airlines, Inc. v. Hardison, supra*, 432 U.S. at 82.

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[3] "[L]ayoffs would be made based on seniority, however the black employees on the seniority list would be skipped over so as to maintain the racial composition of each classification." Pet. for Cert. of Memphis Fire Dept., p. 6 n.3.

[4] In fact, the District Court specifically found "that the adoption of this layoff policy was not adopted with the intent or specific purpose to discriminate against black . . . neither the layoffs nor the policy adopted was intended to be discriminatory." (Pet. of Firefighters Loc. U. No. 1784, p. A73).

The courts below voiced concerns that the layoffs, if conducted in accordance with the procedures contained in the seniority system, would fall most heavily on the minority employees. The layoffs would indeed affect minority employees in greater proportions, but this disproportionate impact is due solely to the fact that most minority firemen were only recently hired. Such a disproportionate impact alone is not enough under § 703(h) to invalidate a seniority system. *Pullman Standard v. Swint*, —— U.S. ——, 102 S. Ct. 1781 (1982.)

In examining the legislative history of § 703(h), this Court has noted that Congress considered the impact that Title VII would have on seniority rights, and was aware that a conflict may exist between the goal of eliminating discrimination in the work place and the policy favoring full and free collective bargaining unimpaired by harmful intrusions by the courts and federal agencies. *American Tobacco Co., supra*, 71 L.Ed. 2d at 760. *See California Brewers Association v. Bryant*, 444 U.S. 598, 608 (1980). While this conflict may have become highly visible when unanticipated budget difficulties necessitated layoffs in the Memphis fire department, the Court of Appeals is not free to upset the balance struck by Congress when it enacted § 703(h). Yet this is precisely the effect of that court's decision when it chose to override the provisions of what it held to be a neutral, legitimate seniority system.[5]

Thus, the decision of the Court of Appeals directly conflicts with prior decisions of this Court regarding the

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[5] The fact that the Complaint filed by Plaintiffs against the City of Memphis was brought pursuant to 42 U.S.C. § 1981 as well as Title VII does not serve as an alternative basis upon which to suspend the operation of a bona fide seniority system. Before a remedy may be imposed under the rubric of that statute, it also must be shown that any differential treatment was the result of purposeful discrimination. *General Building Contractors Association, Inc. v. Pennsylvania*, —— U.S. ——, 73 L.Ed.2d 835 (1982). No such showing was made below. *Stotts, supra*, 679 F.2d at 551, n.6.

statutory protection afforded bona fide seniority systems under Section 703(h). The importance of resolving this conflict in these times of fiscal emergencies and resultant economic layoffs cannot be overstated. The effects on all employees working under agreements containing seniority systems is obvious.

CONCLUSION

For the foregoing reasons, the Amicus requests that a writ of certiorari be granted to review the decision of the Court of Appeals for the Sixth Circuit.

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Nos. 82-206 and 82-229 (Consolidated)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FIREFIGHTERS LOCAL UNION NO. 1784,
Petitioner

v.

CARL W. STOTTS, *et al.*,
Respondents

MEMPHIS FIRE DEPARTMENT, *et al.*,
Petitioners

v.

CARL W. STOTTS, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF ON THE MERITS FOR PETITIONER, FIREFIGHTERS LOCAL UNION NO. 1784

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QUESTION PRESENTED FOR REVIEW

Whether a district court has the authority to modify a consent decree, silent in regard to layoffs, in such a manner that a bona fide seniority system calling for layoff by seniority is abrogated to the detriment of innocent incumbent employees, in an action where there has been no adjudication of discrimination by the employer or the union.*

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* Firefighters Local Union No. 1784 has no parent, subsidiary or affiliate required to be reported under S.Ct.R. 28.1. The local union is itself an affiliate of the International Association of Firefighters, AFL-CIO, CLC.

LIST OF PARTIES

Petitioner Firefighters Local Union No. 1784 intervened in the District Court and appeared as an appellant in Court of Appeals Nos. 81-5348 and 81-5349. Memphis Fire Department, Robert W. Walker, City of Memphis and Joseph Sabatini were also appellants below and are petitioners in No. 82-229. Carl W. Stotts, individually and as a class representative on behalf of all others similarly situated, and Fred L. Jones appeared as appellees in Court of Appeals Nos. 81-5348 and 81-5349, respectively, and are respondents in Nos. 82-206 and 82-229.

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IN THE

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OCTOBER TERM, 1983

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF ON THE MERITS FOR PETITIONER, FIREFIGHTERS LOCAL UNION NO. 1784

OPINIONS AND JUDGMENTS BELOW

The opinion of the Court of Appeals for the Sixth Circuit of which review is sought is reported officially at 679 F.2d 541. The judgment of the Court of Appeals is set forth in the Joint Appendix at J.A. 141. The opinion is set forth in the appendix to the petition of Firefighters Local Union No. 1784 at App. 1. The oral ruling of the District Court, not reported, is reproduced in the appendix to the Union's petition at App. 77.

JURISDICTION

The jurisdiction of the Court rests on 28 U.S.C. § 1254 (1). The judgment of the Court of Appeals was entered on May 7, 1982. The petition for a writ of certiorari was timely filed on August 4, 1982 and was granted on June 6, 1983.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are as follows: 42 U.S.C. §§ 1981, 1983 and 1988 and §§ 703(a), 703(h), 703(j) and 706(g) of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a), 2000e-2(h), 2000e-2(j) and 42 U.S.C. § 2000e-5(g).

The text of the statutes is set forth in the appendix thereto at 1a.

STATEMENT OF THE CASE

The cases presented for review arise from class actions filed by respondents, black male employees of the Memphis Fire Department (hereinafter "respondents"), in the United States District Court for the Western District of Tennessee.[1] Respondents asserted claims of violations of rights secured by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, as amended by the Equal Employment Opportunity Act of 1972 (Pub.L. 92-261, March 24, 1972) and by 42 U.S.C. §§ 1981 and 1983 (Pet. A. 59). Particularly, the respondents alleged that certain promotional policies and practices on the part of the original defendants (hereinafter collectively the "City") were unlawful and favored white employees over their minority counterparts in promotional decisions (J.A. 10, 16). The respondents did not attack the layoff or seniority policies of the City. The relief prayed for the

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[1] *Stotts v. Memphis Fire Dep't*, No. 77-2104 (W.D. Tenn. filed Feb. 11, 1977) (J.A. 8); *Jones v. Memphis Fire Dep't*, No. 79-2441 (W.D. Tenn. filed June 19, 1979) (J.A. 15). The two actions were consolidated in September, 1979 (Union Petition [hereinafter referred to as "Pet."] A. 5).

respondents included an award of back pay, reimbursement of lost pensions, Social Security, experience, training opportunities and promotions (J.A. 11, ¶ 4; 17, ¶4). Petitioner Firefighters Local Union No. 1784 (hereinafter "Union") was not named as a defendant in either complaint. Respondents did not pray for an award of constructive competitive seniority. As a result, the Union did not intervene as the City of Memphis Fire Services Division seniority system was not directly implicated by these actions.

When these actions were filed there was in effect a city-wide seniority system that had been adopted by the City of Memphis as an employment practice in 1973 (J.A. 49). Under the city-wide seniority system, an employee's seniority is calculated on the basis of length of service in permanent employment with the City (J.A. 67, 85). Seniority status is freely transferable from one city division to another (i.e., from sanitation to fire) (J.A. 70-71, 103) and from one job classification to another (i.e., from private to lieutenant) (J.A. 67, 103). The city-wide seniority system was negotiated into the City's Memorandum of Understanding with the Union in 1975 (Pet. A. 80-81; J.A. 49, 115). The city-wide seniority system conferred competitive seniority status to individual employees in the Fire Services Division for priority in job decisions regarding transfers (J.A. 42, 103) and layoffs (Pet. A. 80-81; J.A. 49, 115, 119).

The instant actions were also filed against the background of a prior consent decree entered into by the City of Memphis and the United States Department of Justice in 1974 (hereinafter the "1974 Decree") (J.A. 98-115). The 1974 Decree arose from *United States v. City of Memphis*, No. 74-286 (W.D.Tenn.). This action alleged that the City had engaged in a pattern or practice of discrimination based on race and sex in hiring and promotion within its divisions (J.A. 98). The 1974 Decree resolved all issues raised by the complaint in regard to several city divisions, including the Fire Division (J.A.

98). The 1974 Decree explicitly states that the entry of the decree "shall not constitute an adjudication or admission by the City of any violation of law or findings on the merits of the case" (J.A. 99).

In the 1974 Decree the City agreed to undertake the long-term goal of "achieving throughout the work force proportions of black and female employees in each job classification approximating their respective proportions in the civilian work force" by means of hiring qualified black applicants to fill vacancies in the force (J.A. 101). The City also agreed to attempt to meet an interim percentage hiring goal (J.A. 105).

The 1974 Decree contains no admission by the City that particular individuals were entitled to "victim" status, nor does the 1974 Decree award constructive competitive seniority. The 1974 Decree did not dilute the city-wide seniority system. To the contrary, it endorses the use of the system in regard to the City's employment decisions in these terms:

> The City shall, for all purposes of promotion, transfer and assignment, compute the seniority of a person in the affected class as defined in paragraph 5 [incumbent female and minority employees of the City], as the total seniority of that person with the City.

(J.A. 103)[2] Neither does the 1974 Decree commit the City to a specified timetable for achieving its long-term goals. Rather, it is noted that the goals are "subject to the anticipated budgeted vacancies in the City" (J.A. 105). The 1974 Decree utilizes hiring as the exclusive means of achieving its long-term goals in the Fire Division. No provision of the 1974 Decree has an adverse impact on the job security or seniority rights of incumbent fire employees.

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[2] As indicated above, the seniority system only applied to transfers and layoffs in the Fire Services Division (Pet. A. 80-81).

Against this background, the instant actions were settled by the entry of a consent decree in the District Court on April 25, 1980 (hereinafter the "1980 Decree") (Pet. A. 59-69). As with the 1974 Decree, by agreeing to the entry of the 1980 Decree, the City did not "admit any violations of law, rule, or regulation with respect to the allegations made by plaintiffs [respondents herein] in their complaints" (Pet. A. 60).[3]

The 1980 Decree adopts the same long-term goal and hiring relief as that contained in the 1974 Decree (Pet. A. 64). The 1980 Decree also adopts the approach of the 1974 Decree in establishing an interim hiring goal for the City to fill "on an annual basis at least 50% of all vacancies with qualified black applicants" (Pet. A. 64; J.A. 101). Neither decree requires the City to hire any particular number of employees (J.A. 101-02). The 1980 Decree contains an additional goal "of promoting blacks in the proportion of at least 20% for each civil service classification or uniformed rank as measured on an annual basis" (Pet. A. 65). As was true with the 1974 Decree, the 1980 Decree contains no admission by the City that particular individuals were entitled to "victim" status, nor does the Decree award constructive competitive seniority. Likewise, the 1980 Decree did not dilute the city-wide seniority system. The 1980 Decree contains an explicit waiver by plaintiffs of "a hearing and findings of fact and conclusions of law on all issues raised by the complaints" (Pet. A. 60). No class member raised objections to the 1980 Decree prior to or after its entry (Pet. A. 7). The respondents also waived any entitlement to further relief:

> *Both plaintiffs [respondents] and the class they represent shall seek no further relief* for the acts, practices or omissions alleged in the complaints *save to*

[3] The 1980 Decree states the intention of the parties to parallel and supplement therein the relief provided in the 1980 Decree, thereby disclaiming an intention to conflict with the 1974 Decree (Pet. A. 60).

> *enforce the provisions of this decree, thereby waiving the right to seek further relief.*

(Pet. A. 61) (emphasis added). While the 1980 Decree does contain boilerplate language to the effect that: "[t]he court retains jurisdiction of this action for such further orders as may be necessary or appropriate to effectuate the purposes of this decree" (Pet. A. 69), this "retain[ed] jurisdiction" is limited by the terms of respondents' waivers. As the 1980 Decree left intact the operation of the city-wide seniority system and did not otherwise adversely affect the rights of its members the Union did not voice objections to the entry of the decree.[4]

The record reflects that the total number of blacks hired in the Fire Department between the entry of the 1974 Decree and May, 1981 (including rehires) reached the level of fifty-six percent, thus exceeding the City's interim goals (J.A. 48). While the Justice Department had retained the option of establishing specific numerical ratios for the employment of black firefighters had the City failed in its good-faith attempts to meet the interim goals established by the 1974 Decree (J.A. 105-06), this option was not exercised due to the City's success in this regard. In May, 1981, following that history of compliance with the terms of the 1974 and 1980 Decrees, the city administration announced that layoffs of municipal employees would be necessitated due to an anticipated budget deficit in the upcoming fiscal year. The respondents stipulated at the hearing on respondents' motion for injunctive relief, discussed *infra*, to the City's financial

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[4] The factual exposition in the opinion of the Court of Appeals includes a discussion of certain objections raised to the entry of the 1980 Decree by a group of 11 nonminority firefighters, (Pet. A. 6-8). This group's attempted intervention is treated more fully in *Orders v. Stotts*, 679 F.2d 579 (6th Cir.), *cert. denied*, 103 S.Ct. 297 (1982). The Union did not participate in this intervention attempt. The discussion by the Court of Appeals of the *Orders* intervenors' objections to the 1980 Decree (Pet. A. 26-30) is not pertinent to the instant controversy.

need to implement layoffs (J.A. 75). In anticipation of the layoffs, the City promulgated a formal layoff policy which addressed all aspects of the anticipated layoffs (J.A. 82-96). The layoff policy reaffirmed the City's obligation to lay off Fire Department personnel, if necessary, in conformance with the city-wide seniority system. Neither by its promulgation of the layoff policy nor in any other way did the City announce its intention to renounce or repudiate its commitment to the eventual achievement of the long-term goals agreed to in the 1974 and 1980 Decrees.

On May 4, 1981, the respondents applied for and obtained a temporary restraining order enjoining the City from laying off or reducing in rank any black fire employees (J.A. 20-23). Respondents contended that the routine application of the city-wide seniority system would "effectively destroy the affirmative relief" granted by the 1980 Decree (J.A. 21). The United States Department of Justice neither joined respondents' petition nor sought similar relief in its parallel action.

On May 5, 1981, the District Court permitted the Union to intervene (J.A. 24). The Union intervened in order to assert the rights and interests of its members in the impending layoffs and reductions in rank (J.A. 24). The order allowing the Union's intervention was entered with the consent of all parties. This intervention marked the first occasion that the Union had sought to assert an interest in these actions.

On May 8, 1981, the District Court held an evidentiary hearing on the respondents' request for a preliminary injunction (Pet. A. 72-76; J.A. 29-119). Following the hearing, the District Court found that the 1980 Decree did not address layoffs or the method to be used in the event that layoffs or reductions in rank became necessary

(Pet. A. 73, 77-78).[5] Further, the Court found that the City's layoff policy was not adopted with the purpose or intent to discriminate on the basis of race,[6] but concluded that the application of the city-wide seniority policy would have a discriminatory effect.[7] The District Court found the city-wide seniority system to be non-bona fide due to this discriminatory effect.[8]

The District Court held that it possessed the authority to modify the 1980 Decree. It did so by enjoining the City from implementing the city-wide seniority system insofar as it would decrease the percentage of minority

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[5] The District Court found that the 1980 Decree did not contemplate the circumstances that layoffs might be occasioned by fiscal difficulties, as layoffs were unprecedented in the City's recent history (Pet. A. 73). While the Court of Appeals characterizes the District Court's finding to be that there existed "changed" circumstances (Pet. A. 8, *passim*), the District Court did not go so far in its findings. Indeed, the appearance of the clause in the Union's Memorandum of Understanding providing for seniority-based layoffs as early as 1975 (Pet. A. 81) makes it clear that the City's layoff decision was not a "changed circumstance" and could have been anticipated when the 1980 Decree was entered in April of 1980.

[6] This finding supports the legal conclusion that the city-wide seniority system was bona fide in nature as routinely applied in the layoff situation. *Teamsters v. United States*, 431 U.S. 324, 356 (1977). This finding, as noted by the Court of Appeals, has not been challenged on appeal (Pet. A. 11 n.6).

[7] The statistics relied upon by the District Court (Pet. A. 9, 70-71) are not indicative of post-Act (post March 24, 1972) discrimination or of violations by the City of the terms of the 1974 and 1980 Decrees. As promotional goals were not adopted in the Fire Division via the 1974 Decree (J.A. 107, ¶ 15), the table of promotional statistics contained in the Court of Appeals opinion (Pet. A. 9 n.5) is not indicative of a violation of either the 1974 or 1980 Decrees. In fact, the District Court concluded that the City had not been defiant or contemptuous (Pet. A. 75).

[8] The legal conclusion of the District Court that the city-wide seniority system was non-bona fide was set aside properly as error by the Court of Appeals (Pet. A. 11 n.6).

employees within four classifications in the Fire Department (Pet. A. 77-79).[9] The District Court ordered the City to propose a layoff method consistent with its injunction (Pet. A. 79).

Judgment on the District Court's ruling was entered on May 18, 1981 (Pet. A. 77). Petitioners noticed their appeals (J.A. 5) and moved to stay the District Court's injunction pending appeal (J.A. 120-22). The motion was denied by the District Court (J.A. 122-23), as were similar motions made to the Court of Appeals by petitioners (Pet. A. 12). The appeals were advanced on the calendar of the Court of Appeals for oral argument and expedited consideration on September 15, 1981. The opinion of the Court of Appeals, however, was not filed until May 7, 1982, one year after the hearing before the District Court.

The Court of Appeals affirmed the result below. Although overruling the reasoning of the District Court with regard to the bona fides of the city-wide seniority system,[10] the Court of Appeals concluded that the District Court had the authority to modify the 1980 Decree upon a showing of changed circumstances. The Court of Appeals also concluded that the interests of the Union in the continued application of the city-wide seniority system presented no impediment to such a modification. The judgment of the Court of Appeals was filed on May 7, 1982 (J.A. 141-42). The Union's petition for certiorari was timely filed with the Court on August 4, 1982, and a writ of certiorari was granted on June 6, 1983.[11]

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[9] Following a second hearing before the District Court on June 23, 1981 (J.A. 125-37), the preliminary injunction was expanded to include three additional classifications not represented by the Union (City Pet. A. 82-83).

[10] *See* note 8, *supra*.

[11] The City also applied for a writ of certiorari which was granted by the Court and consolidated for review with the Union's petition. *Memphis Fire Dep't v. Stotts*, 679 F.2d 541 (6th Cir. 1982), *cert. granted*, 103 S.Ct. 2451 (1983) (No. 82-229).

SUMMARY OF ARGUMENT

The orders in dispute impermissibly modified a consent decree that had been entered in a promotional discrimination case by enjoining the employer's routine application of a seniority system to determine the order of layoffs of municipal employees and by requiring the employer to maintain the racial balance then existing in each affected job classification. In doing so, the District Court reached outside the "four corners" of the consent decree to impose a new provision allegedly to implement its "purposes" in violation of the principles expressed by the Court in *United States v. Armour & Co.*, 402 U.S. 673 (1971). The lower courts reached this result despite: (1) the absence of an adjudicated or admitted violation of the law on the part of the parties affected thereby, (2) the express waiver of additional relief contained in the consent decree itself and (3) the lack of an ambiguity in the consent decree. Under these circumstances, there was no basis for the imposition of a new term or provision in the decree.

The lower courts exceeded their authority in modifying the consent decree. Due to the strong interests in the finality of judgments, such a modification is permissible only where changed circumstances have transformed the original decree into an "instrument of wrong." *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932). The circumstances surrounding the municipal layoffs at issue were not "changed" circumstances as would justify modification. Neither are the consequences of the routine application of a bona fide seniority system "wrong" in nature under Title VII of the Civil Rights Act of 1964, the statute which the lower courts sought to enforce. *See* 42 U.S.C. § 2000e-2(h). *Teamsters v. United States*, 431 U.S. 324 (1977).

Rather, the modification imposed by the lower courts is itself "wrong," as it impermissibly: (1) trammels the interests of innocent nonminority incumbents to main-

tain racial balance in favor of persons who had not established "victim" status, (2) imposes a new duty on petitioners in the absence of proper judicial proceedings and (3) disregards the waiver of further relief that was made by respondents. In addition, the orders below would foster uncertainties regarding the finality of Title VII settlements that would make the chances of future settlements much less likely.

The orders imposing the nonconsentual modification of the consent decree had the effect of imposing involuntary class-based relief which contravenes the directives of the statutes that the lower courts sought to enforce. The consent decree at issue neither constitutes an adjudication nor an admission of a violation of the law on the part of petitioners. Thus, the lower courts impermissibly imposed substantial additional relief in the absence of a proven or admitted violation of the law and despite respondents' express waiver of such relief.

The orders below were outside the scope of the remedial authority under the statutes which respondents sought to enforce. Those statutes specifically limit the scope of permissible relief to making whole the "victims" of racial discrimination. *See Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); *Milliken v. Bradley*, 418 U.S. 717 (1974). Rather than granting relief to individual "victims," the relief ordered by the District Court imposed a class-based quota remedy in contravention of Title VII and its clear legislative history. Innocent nonminority incumbents were displaced inequitably. The disputed orders constitute an abuse of discretion, requiring reversal.

Finally, the lower courts disregarded the congressional policy expressed in Title VII protecting routine application of a last-hired, first-fired seniority system. The orders below abrogated the routine operation of a bona fide seniority system to impose a preference based on race. In conferring "constructive" or "fictional" competitive

seniority to junior black employees who had not demanded such relief in the complaints or established their entitlement to such relief, the lower courts inequitably displaced more senior nonminority incumbents who are innocent of any wrongdoing. These black employees proffered no entitlement to preferential treatment other than their race. The resulting orders run contrary to the congressional directives embodied in §§ 703(h) and 703(j) of Title VII.

ARGUMENT

I. THE MODIFICATION OF THE CONSENT DECREE HEREIN TO IMPOSE A SUBSTANTIAL NEW PROVISION IN THE ABSENCE OF AN ADJUDICATED VIOLATION OF THE LAW CONTRAVENES FUNDAMENTAL PRINCIPLES GOVERNING JUDICIAL INTERPRETATION AND ADMINISTRATION OF CONSENT DECREES.

A. Consent Decrees Must Be Construed Within Their "Four Corners."

The District Court modified a consent decree to impose a substantial new term affecting the petitioners. This modification was ordered in the absence of *any* adjudication of a violation of the law against petitioners or admissions to that effect. The Union submits that this modification constitutes clear error which requires reversal.

The governing rule of construction, and its rationale, were stated plainly and aptly by the Court in *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971):

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties

> each give up something they might have won had they proceeded with litigation. Thus the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. *For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.* Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, *the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.*

(Emphasis added; footnote omitted.) *See also United States v. Atlantic Refining Co.*, 360 U.S. 19 (1959); *Hughes v. United States*, 342 U.S. 353 (1952).

Despite its citations to *Armour* (Pet. A. 23-24), the Court of Appeals failed to apply its substance. The District Court determined that the proposed layoffs and demotions under consideration were a circumstance "not provided for in the text of the decree" (Pet. A. 8, 73).[12] Neither respondents nor the Court of Appeals has challenged this determination. It is manifest that the lower courts have reached outside the "four corners" of the 1980 Decree to impose a new obligation not agreed to by the City in contravention of the principles stated in *Armour*.

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[12] The Court of Appeals argues that the District Court "properly recognized" that the respondents did not seek to modify the decrees, but merely sought to "compel compliance with the terms and goals of the decrees" (Pet. A. 33). The determination of the District Court referred to in the text demonstrates that this argument is without merit. It is beyond cavil that the respondents sought relief other than that expressly conferred by the language of the 1980 Decree.

Rather than mandating the result decreed by the courts below, a reading of the "four corners" of the 1980 Decree requires that the City's seniority system, as implemented through the proposed layoff policy, should have been applied. As no provision of the 1980 Decree addressed the City's layoff policies and procedures or prohibited the City's proposed layoffs and reductions in rank by seniority, the District Court's injunction against such action constituted additional affirmative relief beyond that provided in the 1980 Decree. Further, the 1980 Decree contains respondents' express agreement to "*seek no further relief . . . save to enforce the provisions of this Decree, thereby waiving the right to seek further relief*" (emphasis added). The plain language of this waiver unmistakably precludes respondents from seeking a modification even if adequate grounds for such a modification might have existed otherwise.

Rather than limiting itself to an analysis of the "four corners" of the 1980 Decree, the Court of Appeals impermissibly resorts to an interpretation of the purposes and motivations of the 1974 and 1980 Decrees (Pet. A. 2, 3, 25, 36). This approach, as noted in *Armour*, impermissibly invites consideration of how the decree might have been written had the respondents established their factual claims and legal theories in litigation. *Armour*, 402 U.S. at 682. By departing from the "four corners" of the 1980 Decree, the Court of Appeals exceeded its authority.

B. In Interpreting a Consent Decree, the Court May Not Consider Extrinsic Evidence Except To Resolve an Ambiguity in the Terms of the Agreement.

The *Armour* "four corners" rule is consistent with the ordinary principle of contract construction that resort to extrinsic evidence is permissible only when the decree itself is ambiguous. *See Fox v. United States Department of Housing and Urban Development*, 680 F.2d 315, 319 (3d Cir. 1982). Otherwise, as *Armour* teaches, inter-

pretation of a consent decree is normally a question of law based upon the instrument itself.

As noted above, the District Court determined that the proposed layoffs and demotions were not provided for in the text of the decree (Pet. A. 8, 73).[13] As the 1974 and 1980 Decrees were silent in regard to layoffs, there is clearly no ambiguity in the decrees that would call for reference to extrinsic evidence to aid interpretation. The consideration of such evidence by the courts below was in error (Pet. A. 9 n.5, 31, 37). As *Armour* further indicates, the interpretation of a consent decree does not rest on the subjective intent of the parties, rather it involves an interpretation of the meaning of the words used by the parties. *Fox*, 680 F.2d at 320. The 1980 Decree was silent as to layoffs. In fact, neither relief from the City's layoff policies nor seniority relief was sought in the respondents' complaints (J.A. 11-12, 17). While the 1980 Decree was the result of "intense negotiations" (Pet. A. 2), the record does not demonstrate that constructive competitive seniority, layoff practices or policies or the potential for layoffs was considered. Certainly, none of the subjects were addressed in the decree itself.

Respondents waived further relief in the face of the city-wide seniority policy (J.A. 49), the mention of the seniority system in the 1974 Decree (Pet. A. 8; J.A. 103) and the explicit applicability of the seniority system to layoffs contained in the Union's Memoranda of Understanding with the City (Pet. A. 81; J.A. 119). In light of these considerations, the conclusion of the Court of Appeals that the potential for seniority-based layoffs by the City was an unanticipated change in circumstances (Pet. A. 2) is in error. At the very least, it was capable of anticipation by respondents. Indeed, it is now clear that respondents seek the federal courts to bail them out after they failed to complain about and failed to nego-

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[13] The conclusion of the Court of Appeals to the contrary was in error (Pet. A. 33).

tiate about layoffs, once confronted by actual layoffs. Respondents actually seek to have the courts rewrite their settlement agreement for them after they failed to address a subject they now see they should have addressed.

In point of fact, respondents failed to insist to impasse, as it were, on the conferral of any constructive competitive seniority. The record is quite clear that Mayor Wyeth Chandler was opposed adamantly to the abrogation of the seniority status of incumbent employees. As the Mayor testified:

> It is my opinion that under the Consent Decree, we agreed to hire, we agreed to promote, and we agreed to do it in percentages, or what have you. And be fair and equitable, and I felt that that was fair and equitable, that I did then agree to it, consented to it.
>
> But I certainly felt differently towards any policy that would put people out of work, put them on the street, based anything other than on the thing that has been used in every city in this country, in every business in this country, and by the city, and in the Consent Decree since 1974, and that is the seniority policy in the union agreement, and everything else.

(J.A. 37-38) Respondents certainly apprehended that the terms of the 1980 Decree constituted the best negotiated setlement that could have been exacted from the City. Rather than risking the potential for a less favorable outcome at trial, respondents accepted a settlement that gave them less than what might potentially have been gained at trial. Respondents now seek to add to the 1980 Decree, through judicial modification, relief that could not have been gained through negotiation and settlement.

The conclusion is inescapable that respondents have not sought enforcement of the terms of the decrees as required by *Armour*. Instead, respondents sought imposition of an additional term beyond the City's consent. The only prior instance in which this Court has endorsed

imposition of new and substantial burdens on a defendant party to a consent decree, *United States v. United Shoe Machinery Co.*, 391 U.S. 244 (1968) (see discussion in *Fox*, 680 F.2d at 323), is inapposite due to lack of an adjudication of a violation of the law herein to support the imposition of such burdens. In the instant circumstance, it is impermissible for respondents to draw on a consent which, by its very terms, is not available. *See Ford Motor Co. v. United States*, 335 U.S. 303, 322 (1948). The City had not agreed to constructive competitive seniority relief or to any relief which affected the routine application of its seniority system, as clearly stated by Mayor Chandler (J.A. 37-38).

C. Nonconsentual Modification of a Consent Decree May Be Allowed Only upon the Establishment of a Proper Predicate Absent Herein.

The Court of Appeals framed the principal issue raised on appeal in terms of "whether the District Court erred in modifying the 1980 Decree to prevent minority employment from being affected disproportionately by unanticipated layoffs." (Pet. A. 12) Even if the courts below were not limited to an interpretation of the "four corners" of the 1980 Decree under *Armour*,[14] those courts were still without authority to modify the 1980 Decree to afford respondents additional relief beyond the scope of that relief conferred by the language of the decree.

Respondents have not sought enforcement of an existing term of the 1980 Decree, but imposition of an additional term beyond the scope of petitioners' consent. There can be no serious contention that petitioners have violated the terms of the 1980 Decree (Pet. A. 75). *Cf. United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975). Neither did the City announce its intention to renounce or repudiate its commitment to achieving the

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[14] The Union contends that this should be the case for the reasons noted above, particularly in light of the respondents' express waiver of additional relief. (*See* Pet. A. 61).

long-term goals contained in the 1974 and 1980 Decrees as the Court of Appeals intimates (Pet. A. 33). Thus, the Court must determine whether, in the absence of an adjudication of a violation of the law or a showing of a violation of the terms of the decree, the lower courts have the authority to modify the 1980 Decree to impose a new term not previously agreed to by the petitioners.

The standard for reopening a consent decree is a strict one; the relief is extraordinary and may be granted only upon a showing of exceptional circumstances. *Fox*, 680 F.2d at 322. There are strong interests in the finality of the judgment of the District Court as embodied in the 1980 Decree. In fact, when the respondents have made "a free, calculated and deliberate choice to submit to an agreed upon decree rather than seek a more favorable litigated judgment their burden . . . is perhaps even more formidable than had they litigated and lost." *Id.* Respondents failed to carry their burden and should not have been granted a modification.

While courts exercising their equitable jurisdiction are not powerless to alter the terms of a prospectively operating consent decree, this power must only be exercised with circumspection. Modification must not be allowed unless changed circumstances have transformed the original decree into an "instrument of wrong." *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932). Nothing less than a "clear showing of grievous wrong evoked by new and unforeseen conditions" should lead a court to change or modify the terms of the original decree. *Id.* at 119. The Court of Appeals justified its affirmance of the District Court on the basis that the 1980 Decree had been transformed into an "instrument of wrong" by new and unforeseen circumstances constituting a "fundamental change in the essential facts upon which the decree [was] based" (Pet. A. 34-37). The Union takes exception to this conclusion and the premises on which it is based.

The essential facts upon which the 1980 Decree was based, that the respondent class was involved in an employer-employee relationship in a circumstance in which city-wide seniority was a relevant factor in certain job decisions, including potential layoffs, had, in fact, not changed as a result of intervening circumstances since the entry of the 1980 Decree. Nor had the City abandoned or repudiated the long-term goal agreed to in the 1980 Decree, as the Court of Appeals suggests (*see* Pet. A. 33). Neither were the lower courts justified in their conclusion that the potential for layoffs was unforeseen. The record is clear that the City and the Union anticipated the potential for layoffs as early as 1975 when the following language was included in their Memorandum of Understanding:

> Layoff—In the event it becomes necessary to reduce the Fire Division, seniority alphabetically shall govern lay-offs and recalls. Employees lowest in seniority shall be laid off first and shall be the last to be recalled.

(Pet. A. 81, J.A. 115). The fact that respondents failed to anticipate the potential for future layoffs when they acceded to a waiver of further relief in the 1980 Decree does not justify a finding that the potential for layoffs was unforeseen or unforeseeable in the instant case.

The prospects for layoffs and reductions in force in the City of Memphis Fire Division must also be viewed in light of the instances of such layoffs in other municipalities in the relevant period. A survey of 100 cities conducted in November, 1981 by the U.S. Conference of Mayors indicated that 72 of those cities surveyed had laid off employees or were expecting to lay off employees in the near future. Bureau of National Affairs, *Layoffs, RIFs and EEO in the Public Sector*, Fair Employment Practices Supplement 439, February 13, 1982, p. 23-24. Similar layoffs had previously arisen within the jurisdiction of the Sixth Circuit in Cincinnati, Ohio in 1976,

Youngblood v. Dalzell, 568 F.2d 506 (6th Cir. 1978), and in Toledo, Ohio in 1980, *Brown v. Neeb*, 644 F.2d 551 (6th Cir. 1981).

The Union also challenges the Court of Appeals' assertion that the 1980 Decree had been transformed into an "instrument of wrong." The "wrong" complained of is that the 1980 Decree, if not modified, would permit the application of the city-wide seniority system in determining the order of layoffs and reductions in rank. The routine application of the city-wide seniority system would have had the effect of temporarily reducing the percentage of blacks in the affected job classifications.[15] The Court of Appeals' value judgment that the routine application of the city-wide seniority system constituted a "wrong" ignores the clear statement of congressional policy embodied in § 703(h) of the Civil Rights Act of 1964. Section 703(h) clearly stands for the proposition that the routine application of a bona fide seniority system is not a "wrong." Since a district court's authority to adopt a consent decree arises only from the statute the decree is intended to enforce, *System Federation No. 91 v. Wright*, 364 U.S. 642, 651 (1961), its authority to modify a decree enforcing such a statute can only be exercised in light of the policies of the statute.

In the area of employment discrimination, the routine application of systems of competitive seniority which have been created or operated without a racially discriminatory purpose has been immunized from the statutory proscriptions against employment practices which, although neutral on their face and in intent, nonetheless discriminate in effect against a particular group. *Teamsters v. United States*, 431 U.S. 324, 348-54 (1977).

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[15] Mayor Wyeth Chandler testified that the effects of the layoffs and reductions in rank were anticipated to be temporary in nature, for example that lieutenants who were bumped down would be back "in rank" within a six-month to two-year period (J.A. 39).

Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h), specifically provides:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race . . . or national origin. . . .

As this Court concluded in *Teamsters*, "the unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." 431 U.S. at 352. In so holding, the Court acknowledged that the longest tenure employees, even though they might without exception be white, would enjoy a " 'disproportionate distribution of advantages [which] in a very real sense [would] operate to 'freeze' the status quo of prior discriminatory employment practices.' " 431 U.S. at 350. Nevertheless, this Court recognized that this perpetuation effect could not overcome "the congressional judgment . . . that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees. . . ." 431 U.S. at 353.

The city-wide seniority system in this case was adopted as an employment policy of the City of Memphis in 1973 (J.A. 49), and has been present in the City's Memoranda of Understanding with the Union since 1975 (Pet. A. 80-81; J.A. 49, 116-19). Respondents have at no time mounted any challenge to the genesis or operation of this system. The system is clearly neutral and nondiscriminatory. Its continued operation is therefore correct and proper under Title VII, even though it may perpetuate the effects of past discrimination by the employer.[16]

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[16] The seniority system is valid under both the United States Constitution and 42 U.S.C. § 1981 absent a showing of discrimina-

The Court of Appeals chose to ignore the clear congressional statement of policy and to impose on the parties its own opinion concerning the "wrongness" of the routine application of the city-wide seniority policy to layoffs. In fact, the modification of the 1980 Decree resulted in a "wrong" inflicted on innocent nonminority incumbents who lost their rank and their jobs as a result of the modification. To the extent that these incumbents were so affected, the lower courts impermissibly "trammel[ed] the interests of the white employees" and sought to "maintain racial balance" at the expense of innocent nonminority incumbents. *Cf. United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979), *reh'g denied*, 444 U.S. 889 (1980).[17]

It is important to note that the question for decision in this case is whether the 1980 Decree should have been

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tory purpose in its inception or operation. *See Washington v. Davis*, 426 U.S. 229 (1976) (Fourteenth Amendment); *General Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 102 S.Ct. 3141 (1982) (§ 1981).

Title VII was made applicable to the City by the Equal Employment Opportunity Act of 1972 (Pub. L. 92-261, Mar. 24, 1972). Thus, *any* discriminatory practices on the part of the City predating March 24, 1972 would not have been actionable under Title VII. In this case, the relevant time period for actionable discrimination dates back only to February 23, 1975, 180 days prior to Mr. Stotts' charge filed before the EEOC. Pursuant to 42 U.S.C. §§ 1981 and 1983, respondents could only seek a remedy for intentional discrimination, *General Bldg. Contractors Ass'n v. Pennsylvania*, 102 S.Ct. 3141 (1982); *Washington v. Davis*, 426 U.S. 229 (1976), that took place within one year of the filing of the original complaint herein on February 16, 1977 (J.A. 1, 8).

[17] As a result, the class-based relief imposed upon petitioners by the lower courts in order to maintain the percentage of blacks in each job classification exceeds even that relief to which the City and respondents might have permissibly consented. *See Weber*, 443 U.S. at 208. The Court of Appeals acknowledged that the terms of the decree cannot require the discharge of nonminority workers and their replacement with minorities (Pet. A. 16). It is quite peculiar that the Court of Appeals would conclude that a consent decree could be modified after the fact to provide relief that would have been impermissible if contained in the decree as originally drafted.

modified to impose a duty that was not contained therein, and not, as in *Swift*, whether the defendant should be released from the obligations imposed by the decree. The instances in which such a result has been approved by this Court in prior cases have been limited to those circumstances in which the decree was entered after an adjudication or an admission of a violation of the law on the part of the defendant party to the decree. *See Fox*, 680 F.2d at 323. Both the 1974 and 1980 Decrees contained nonadmissions clauses (Pet. A. 60; J.A. 99). The 1974 Decree provided that it "shall not constitute an adjudication or admission by the City of any violation of law or findings on the merits of this case" (J.A. 99). Where there has been no adjudication or admission of a violation of the law, as in this case, the proper predicate does not exist for the imposition of additional relief without the consent of the parties affected thereby. *See United States v. Atlantic Refining Corp.*, 360 U.S. 19, 23 (1959); *Hughes v. United States*, 342 U.S. 353, 357-58 (1952); *Fox*, 680 F.2d at 323. As the consent decrees involved herein were entered without an admission or an adjudication of a violation of the law and without fact findings that would support the imposition of further relief, the proper predicate did not exist for the nonconsentual modification of the 1980 Decree over petitioners' objections.

Apparently, the Court of Appeals acknowledged the need for an admission of a violation to support the imposition of additional relief. To find an admission, the Court of Appeals would stretch the City's disclaimer of wrongdoing beyond recognition and into an admission of wrongdoing:

> In the context of consent decrees providing affirmative action relief, we interpret the disclaimer of wrongdoing to be an admission that there is a statistical disparity which the defendants cannot unequivocally explain, together with a reservation of the right to attempt to explain it at any other time.

(Pet. A. 15 n.10) (Citations omitted) Such an interpretation of a disclaimer of wrongdoing, if allowed to stand, would have a serious negative impact upon the potential for future settlement of Title VII litigation.

Even if under some "exceptional" circumstances a court might have the authority to modify a consent decree over the objection of defendant parties thereto or impose new obligations in the absence of an admission or adjudication of a violation of the law, such exceptional circumstances do not exist herein. Viewed in their best light, respondents' contention is that their expectations would have been frustrated by the seniority-based layoffs caused by fiscal circumstances beyond the control of the City that might have been anticipated by respondents and addressed in negotiations with the City. Such a circumstance does not constitute an "exceptional" circumstance. *Accord Fox*, 680 F.2d at 323. The municipal layoffs in this case was a possibility that respondents should have considered or anticipated for the reasons detailed above. Also, the petitioners had not been guilty of misconduct that might have made equitable the imposition of involuntary duties without a prior adjudication.[18]

Rather than demonstrating the existence of exceptional circumstances which might make equitable the reopening of the 1980 Decree to provide further relief to respondents, the record establishes that the modification was inequitable. Respondents waived their entitlement to further relief beyond that granted by the strict terms of the 1980 Decree (Pet. A. 61). To impose additional duties under the 1980 Decree is to disregard the basic rights of

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[18] Despite the Court of Appeals' citations to *Brown v. Neeb*, that case is distinguishable from this case. Unlike *Brown*, the City is not an adjudicated discriminator, as was the City of Toledo. *See* 644 F.2d at 553. Respondents could not establish that the City had been recalcitrant in its compliance with the obligations imposed by the 1974 and 1980 Decrees. Unlike *Brown*, the City had approached or exceeded its hiring goals (J.A. 48). It was not established that the City had been defiant or contemptuous (Pet. A. 74-75).

petitioners who waived their right to litigate defenses by consenting to have a decree entered against them. The conditions upon which rights are waived must be respected. *Armour*, 402 U.S. at 682.

The Court of Appeals' analysis would subject parties to a consent decree to a virtually unlimited power of modification by district courts whose lodestar would be their determination of what the parties would have agreed to on a certain issue if, indeed, they had thought about it. Rather than encouraging compromise and settlement, this approach fosters uncertainties that reduce the incentive of employers and unions to settle employment discrimination litigation and increases the likelihood of challenges from concerned third parties, particularly labor unions in cases in which they are not parties. Thus, the Court of Appeals' analysis actually makes the chances of settlement in an employment discrimination case much less likely due to remaining uncertainties as to what changes a district court could make in the decree in the future.

II. THE INVOLUNTARY CLASS-BASED RELIEF GRANTED BELOW CONTRAVENES THE STATUTES THE COURTS SOUGHT TO ENFORCE.

A. The Order of the District Court Granted Relief in Addition to that Sought in the Complaint and Granted in the Decrees Without Establishing Petitioners' Liability or Respondents' Entitlement to the Relief.

By the 1974 Decree, the City agreed to a long-term goal of "achieving throughout the work force proportions of black and female employees in each job classification, approximating their respective proportions in the civilian work force." (J.A. 101) To achieve this goal, the City agreed to interim hiring goals in entry level positions (Pet. A. 63-65; J.A. 101). The 1980 Decree supplemented this relief previously agreed to by providing promotional goals (Pet. A. 65-66) and monetary relief in the form of back pay (Pet. A. 66).

The 1980 Decree recites that respondents had brought actions against the City alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, as amended and made applicable to the City by the Equal Employment Opportunity Act of 1972 and 42 U.S.C. §§ 1981 and 1983. The City, however, did not admit to having violated the law by discriminating on the basis of race or sex in its employment practices (Pet. A. 60), nor had a violation of the law been adjudicated or admitted by petitioners in any other context (*see* J.A. 99). Neither decree endeavored to identify particular victims as being actual victims of discrimination.

By the nonconsentual modification of the 1980 Decree, the lower courts exceeded their remedial authority. As pointed out in Part I, *supra*, the lower courts could not draw their authority to modify the 1980 Decree from its terms. In addition, the record before the District Court is insufficient to support the relief ordered herein under the applicable statutes.

The relief imposed upon the petitioners modified the 1980 Decree to forbid the City from applying the city-wide seniority policy "insofar as it will decrease the percentage of black [firefighters in certain job classifications] that are presently employed in the Memphis Fire Department." (Pet. A. 78, City Pet. A. 80, 83) As a result of these orders, the City was required to lay off and reduce in rank more senior incumbent nonminority employees to maintain the precise racial balance previously existing in each job classification affected by the order.

The first infirmity of the judicially imposed modifications is that those orders afford respondents substantial relief in the absence of a proven violation of the law. The orders below bypass the "liability" phase of litigation and enter the remedial phase without the support of a proven finding of discrimination on the part of petitioners.[19]

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[19] *See* D. Dobbs, *Handbook on the Law of Remedies*, § 1.1 (1973). The law of judicial remedies concerns itself with the nature and scope of the relief to be given a plaintiff once *he has followed*

As the 1980 Decree was not grounded on findings of discrimination against petitioners, no further relief was appropriate beyond that originally granted in the decree itself, particularly in view of respondents' express waiver of further relief (Pet. A. 61). Even if the proof submitted to the District Court at the preliminary injunction hearing was adequate to raise some inference of discrimination, respondents had additionally "waive[d] a hearing and findings of fact and conclusions of law on all issues raised by the complaints." (Pet. A. 60)[20] Thus, even if the respondents had prayed for constructive competitive seniority in their complaints, which they did not, that potential relief was lost at the time the 1980 Decree was entered.

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appropriate procedure in court and has established a substantive right (Emphasis added).

In accordance with these principles, this Court has observed that district courts must limit nonconsentual relief to circumstances in which an illegal discriminatory act or practice is proven or found. *See Franks v. Bowman Transp. Co.*, 424 U.S. 747, 758 (1976).

[20] After the City articulated its reasons for implementing seniority-based layoffs (*see, e.g.*, J.A. 37-38, 43-44), the ultimate burden of persuasion remained with respondents. As the Court explained in *Ford Motor Co. v. EEOC*, 102 S.Ct. 3057 (1982):

> In Burdine we reiterated that after a plaintiff has proved a prima facie case of discrimination, "the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.'" *The "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."* It was then made clear that:
>
> "The defendant need not persuade the Court that it was actually motivated by the proffered reasons. . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff."

Id. at 3062 n.7 (citations omitted; emphasis added). The courts below ignored this method of analysis and implemented a remedy without a supporting finding of discrimination.

B. A Court May Not, in Order To Achieve a Particular Racial Balance, Direct that Innocent Incumbent Employees Be Deprived of Their Jobs so that Those Jobs May Be Filled by Persons of Another Race Who Have Not Been Adjudicated as Victims of Unlawful Discrimination.

Even if the initial infirmity, lack of a proven violation of the law, was not present, the Union submits that the orders of the lower courts must be reversed as being beyond the scope of the District Court's remedial authority. As set forth above, respondents sought relief in their complaints for alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, as amended by the Equal Employment Opportunity Act of 1972 and 42 U.S.C. §§ 1981 and 1983. While violations of these statutes have not been proven against petitioners, these statutes provided the basis for any relief to which respondents might have been entitled, even had these cases been fully litigated.

Where private litigants assert claims arising under federal statutes, federal courts may exercise their jurisdiction to fashion relief only to the extent consistent with the applicable statute. *See System Federation No. 91*, 364 U.S. at 651. When the authority of the federal courts derives from an act of Congress, substantive rights simply do not exist if they are not created by the statute. "[I]n our constitutional system, the commitment to the separation of powers is too fundamental for [the courts] to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public will.'" *TVA v. Hill*, 437 U.S. 153, 195 (1978).[21]

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[21] Title VII, of course, epitomizes Congress' formulation of public policy. When Congress so acts, it supplants with its own views any judicial determination of public policy. *Cf. United States v. Atlantic Mutual Ins. Co.*, 343 U.S. 236, 245 (1952) (Frankfurter, J., dissenting). *Compare Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946) *with Northwest Airlines Inc. v. Transport Workers*, 451 U.S. 77 (1981).

Thus, the pertinent inquiry is whether Title VII and 42 U.S.C. §§ 1981 and 1983 authorize the relief afforded respondents by the lower courts.[22] The focus of these statutes is to afford protection to individuals, not to minority groups as a whole.[23] It is clear that the relief available under §§ 1981 and 1983 is limited to relief to actual victims of discrimination. As the Court has stated:

> . . . the remedy is necessarily designed, as all remedies are, to restore the *victims* of discriminatory conduct to the position they would have occupied in the absence of such conduct.

Milliken v. Bradley, 418 U.S. 717, 746 (1974) ("Milliken I"); *see also Milliken v. Bradley*, 433 U.S. 267, 281 (1977) ("Milliken II"). Also, the remedies specified under Title VII to rectify illegal employment discrimination are consistent with and define the scope of relief available in the instant context under 42 U.S.C. §§ 1981 and 1983.

The choice of law provision, 42 U.S.C. § 1988, specifies the law to be applied to remedy violations of 42 U.S.C. §§ 1981 and 1983. This section provides in pertinent part:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title . . . for the protection of all persons in the United States, in their civil rights, and for their

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[22] The Union would show that this inquiry is largely academic in the absence of a proven violation of these statutes on the part of petitioners. No violation having been found, it was simply beyond the power of the District Court to fashion a remedy for a wrong that had not been proven.

[23] *See Connecticut v. Teal*, 102 S.Ct. 2525, 2534 (1982) ("The principal focus of [Title VII] is the protection of the individual employee, rather than the protection of the minority group as a whole. Indeed, the entire statute and legislative history are replete with references to protection for the individual employee. *See, e.g.*, §§ 703(a)(1), (b), (c). . . .") (Title VII); *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (constitutional violations).

> vindication, shall be exercised and enforced in conformity with the laws of the United States so far as such laws are suitable to carry the same into effect. . . .

"This means, as we read § 1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 240 (1969). As § 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) defines the remedies that a court may order upon finding employment discrimination, application of § 706(g) in providing remedies for violations of 42 U.S.C. §§ 1981 and 1983 in the employment discrimination context best serves the policies expressed in those federal statutes.

The remedial provision of Title VII, § 706(g), contains a limitation in its last sentence that bars the relief prescribed by the lower courts. That sentence reads in pertinent part:

> No order of the court shall require the . . . reinstatement of an individual as . . . an employee . . . if such individual . . . was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin. . . .

This section requires a court "to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the *victims* of racial discrimination in hiring." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 (1976) (footnote omitted); *accord, Teamsters*, 431 U.S. at 364. The District Court's orders in this case are contrary to both the language and spirit of this provision.

The District Court's orders afforded relief to members of the respondent class on the basis of their race alone without consideration of whether the individual members of the class were actual victims of discrimination. Those orders explicitly sought to maintain the racial balance

then prevailing in each affected job classification (Pet. A. 78). Obviously, as no violations of the law had been proven against petitioners in regard to the class, no individuals could claim proven victim status. Instead of limiting relief to victims, the District Court ruled that the layoffs could only proceed if the respondent class was not disproportionately affected thereby. To the extent that it did so, the District Court imposed for the first time in this litigation strict quotas upon the racial balance in the work force.

In addition to the plain language of § 706(g), the legislative history of Title VII demonstrates that Congress meant to forbid such a result. The opening speech on the floor of the House of Representatives in support of the Act was delivered by Representative Celler, the Chairman of the House Judiciary Committee. A portion of that speech was devoted to answering the "unfair and unreasonable criticism" that had been leveled against the bill:

> In the event that wholly voluntary settlement proves to be impossible, the Commission could seek redress in the federal courts, but it would be required to prove in the court that the particular employer involved had in fact, discriminated against one or more of his employees because of race, religion or national origin. . . .
>
> Even then, the court could not order that any preference be given to any particular race, religion or other group but would be limited to ordering an end to discrimination [110 Cong. Rec. 1518 (1964)].

Subsequent to the House's passage of the bill, the Republican sponsors in the House published a memorandum describing the bill as passed. In pertinent part, the memorandum stated:

> Upon conclusion of the trial, the federal court may enjoin an employer or labor organization from practicing further discrimination and may order the hiring or reinstatement of an employee or the accept-

> ance or reinstatement of a union member. *But Title VII does not permit the ordering of racial quotas in business or unions and does not permit interferences with seniority rights of employees or union members.* [*Id.* at 6566; emphasis added].

When the bill was taken up by the Senate, Senators Humphrey and Kuchel, the co-managers of the bill, undertook a description of each of the titles. In the course of his description of Title VII, Senator Humphrey detailed the manner in which discrimination claims could be processed through suit and finding of discrimination, and then described the remedial powers available to a court:

> The relief sought in such a suit would be an injunction against future acts or practices of discrimination, but the Court could order appropriate affirmative relief, such as hiring or reinstatement of employees and payment of backpay. This relief is similar to that available under the National Labor Relations Act in connection with the unfair labor practices, 29 United States Code 160(b). *No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of section 707(e)* [enacted, without change, as section 706(g)]. . . .
>
> *Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial 'quota' or to achieve a certain racial balance.*
>
> That bugaboo has been brought up a dozen times; but is nonexistent. [*Id.* at 6548; emphasis added]

Senator Kuchel made the other major opening speech in support of the bill. He, too, took pains to demonstrate that the remedial provisions would not permit court-ordered quotas:

> Title VII might justly be described as a modest step forward. Yet it is pictured by its opponents and detractors as an intrusion of numerous federal inspectors into our economic life. Those inspectors would presumably dictate to labor unions and their members with regard to job seniority, seniority in apprenticeship programs, racial balance in job classifications, racial balance in membership, and preferential advancement for members of so-called minority groups. Nothing could be further from the truth. I have noted that the Equal Employment Opportunity Commission is empowered merely to investigate specific charges of discrimination and attempt to mediate or conciliate the dispute. It would have no authority to issue orders to anyone. Only a federal court could do that, and *only after it had been established in that court that discrimination because of race, religion, or national origin had in fact occurred.* Any order issued by the Federal district court would of course be subject to appeal. *But the important point, in response to the scare charges which have been widely circulated to local unions throughout Amercia, is that the court cannot order preferential hiring or promotion consideration for any particular race,* religion, or other group. Its power is solely limited to ordering an end to the discrimination which is in fact occuring. [*Id.* at 6563; emphasis added]

Each day during the Senate debates on the civil rights bill, the principal Senate sponsors prepared a bipartisan civil rights newsletter which was hand-delivered to the office of each senator supporting the bill. Its purpose as explained by Senator Humphrey was "to keep senators who are in favor of civil rights legislation informed of our point of view." *Id.* at 5042. The April 11, 1964 issue of the newsletter, published two days after the filibuster had begun, declared:

> Under title VII, *not even a Court,* much less the Commission, *could order racial quotas or the hiring, reinstatement, admission to membership or payment*

> *of back pay for anyone who is not discriminated against in violation of this title.* [*Id.* at 14465; emphasis added]

On May 25, Senator Humphrey introduced a brief explanation of the House bill which he said had been "read and approved by the bipartisan floor managers of the bill in both houses of Congress." *Id.* at 11847. In pertinent part, the explanation provided:

> The relief available is a court order enjoining the offender from engaging further in discriminatory practices and directing the offender to take appropriate affirmative action; for example, reinstating or hiring employees, with or without back pay, . . .
>
> *The Title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment* [*Id.*; emphasis added].

The legislative history of the 1964 Act reveals the strong intention of its proponents to disclaim any inference that courts would be empowered by the provisions of the Act to render any order that would afford a preference on the basis of race, impose racial quotas or, in short, grant any relief prior to the establishment in court that discrimination had, in fact, occurred. These assurances were necessary to ensure passage of the Act. *See Weber*, 443 U.S. at 206.

The only legislative act in the interim since 1964 is the passage of the Equal Employment Opportunity Act of 1972 which amends Title VII in several respects. In essence, the 1972 law amends §§ 701, 702 and 704 to broaden Title VII's scope of coverage, and amends §§ 705 and 706 to grant the EEOC the authority to investigate charges and to bring suits in federal court. Section 703 of Title VII was not amended at all and the only arguably pertinent changes made in 706(g) were the follow-

ing additions to its first sentence (the new language is indicated in italics):

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative relief as may be appropriate, which may include, *but is not limited to*, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), *or any other equitable relief as the court deems appropriate.*

The italicized language had its origin in an amendment introduced by Senator Dominick, who was leading one faction of a filibuster against the Senate Labor Committee bill. The most significant aspect of the committee bill—and the principal issue causing the filibuster—was a proposal to confer "cease and desist" authority on the EEOC; that bill proposed to make no change in either § 703(a) or § 706(g). Adoption of the Dominick amendment, which denied the EEOC independent enforcement power and instead empowered the EEOC to institute lawsuits in federal court, was the key to ending the filibuster. Neither Senator Dominick nor anyone else explained or even discussed the purpose of the additional language in the first sentence of § 706(g), and the only explanation therefor is that contained in a section-by-section analysis prepared by Senator Williams, the Chairman of the Labor Committee and the manager of the legislation:

> *Section 706(g)*—This subsection is similar to the present section 706(g) of the Act. It authorizes the court, upon a finding that the respondent has engaged in or is engaging in an unlawful employment practice, to enjoin the respondent from such unlawful conduct and order such affirmative relief as may

> be appropriate including, but not limited to, reinstatement or hiring, with or without back pay, as will effectuate the policies of the Act. Back pay is limited to that which accrues from a date not more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the aggrieved person(s) would operate to reduce the back pay otherwise allowable.
>
> The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that *persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.* [118 Cong. Rec. 7166, 7168 (1972); emphasis added]

As this Court explained in *Franks*, 424 U.S. at 764 n.21, the Congress that "added the phrase speaking to 'other equitable relief' in section 706(g) . . . indicated that 'rightful place' was the intended objective of Title VII and the relief accorded thereunder" and, the court understood the portion of the section-by-section analysis quoted above to be "emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require *to effect restitution, making whole insofar as possible the victims of racial discrimination. . . .*" *Id.* at 764 (emphasis added).

There is not a word in the legislative history to suggest that "other equitable relief" was added to § 706(g) to authorize quota remedies, and it is hardly conceivable

that so profound a departure from the anti-quota decision of Congress in 1964 would have been accomplished without some evidence of an intention to do so.

The decisions of this Court regarding permissible remedies under § 706(g) have consistently drawn the line where Congress intended it to be drawn. While courts are certainly permitted to fashion make-whole relief, including constructive competitive seniority, for "actual victims of racial discrimination" *see Franks*, 424 U.S at 772, individual entitlement to relief such as constructive competitive seniority must be established even if a pattern or practice of discrimination has been proven. *See Teamsters*, 431 U.S. at 356-77. Even so, any award of relief, including constructive competitive seniority, must be predicated upon an established violation of the Act. As stated in *Teamsters*:

> *[T]he question of individual relief does not arise until it has been proved that the employer has followed an employment policy of discrimination.*

Id. at 361 (emphasis added). *See also Franks*, 424 U.S. at 791-92 (Powell, J., concurring in part and dissenting in part).

As the legislative history demonstrates, the limitations imposed by Congress on relief available pursuant to Title VII was motivated in no small part due to the concern that innocent nonminority incumbents might be displaced unfairly by class-wide awards of constructive competitive seniority. Provisions such as §§ 703(h) and (j) (discussed in Part II.C., *infra*) are indicative of this concern. As the Fifth Circuit noted in *Paperworkers Local 189 v. United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970):

> It is one thing for legislation to require the creation of fictional seniority for newly hired Negroes, and quite another thing for it to require that time actually worked in Negro jobs be given equal status with time worked in white jobs. To begin with, requiring

> employers to correct their pre-Act discrimination by creating fictional seniority for new Negro employees would not necessarily aid the actual victims of discrimination. There would be no guaranty that the new employees had actually suffered exclusion at the hands of the employer in the past, or, if they had, there would be no way of knowing whether, after being hired, they would have continued to work for the same employer. *In other words, creating fictional employment time for newly-hired Negroes would comprise preferential rather than remedial treatment. The clear thrust of the Senate debate is directed against such preferential treatment on the basis of race.*

Id. at 995 (emphasis added).[24] The relief afforded to respondents herein clearly crosses over into the impermissible, preferential category of relief and would be invalid even had the proper predicate been laid for some relief due to an adjudicated violation of the Act.

The preferential relief granted below is inequitable in nature as the courts have deprived innocent nonminority incumbents of their jobs or their rank so that they might be replaced by employees who were not adjudicated victims of discrimination. As the Court stated in *Teamsters*:

> [T]he extent to which the legitimate expectations of nonvictim employees should determine when victims are restored to their rightful place is limited by basic principles of equity. In devising and implementing remedies under Title VII, no less than in formulating any equitable decree, a court must draw on the "qualities of mercy and practicality [that] have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." Es-

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[24] *Paperworkers* was cited with approval by this Court in *Teamsters*, 431 U.S. at 354 n.40. The Court observed that: "Title VII did not proscribe the denial of fictional seniority to pre-Act discriminatees who got *no* job." *Id.*

> pecially when immediate implementation of an equitable remedy threatens to impinge upon the expectations of innocent parties, the courts must "look to the practical realities and necessities inescapably involved in reconciling competing interests," in order to determine the "special blend of what is necessary, what is fair, and what is workable."

431 U.S. at 374-75 (citations omitted). While it defended the District Court's orders on the basis that the District Court "did not issue a blanket order enjoining the layoff of all minority workers" (Pet. A. 37), the Court of Appeals ignored the equitable considerations imposed by the very statute which it sought to enforce and sanctioned a remedy which impinged upon the expectations of innocent nonminority incumbents in favor of employees who had neither claimed or established "victim" status.

The lower courts have substituted their own notions of an appropriate remedy for the restrictions on judicial relief imposed by § 706(g). While § 706(g) provides discretion to the district courts in structuring relief for individual victims of discrimination once a violation of the law has been proven,

> Such discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'
>
> It is true that '[e]quity eschews mechanical rules . . . [and] depends on flexibility.' But when Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes and not 'equity [which] varies like the Chancellor's foot.'

EEOC v. Ford Motor Co., 102 S.Ct. 3057, 3063 (1982) (citations omitted) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416-17 (1975)). Since the remedial authority of courts under § 706(g) is limited by the

provision's very terms to effectuating the Act's overriding purposes of bringing discrimination to an end and compensating victims for their injuries, the District Court lacked authority to enter the modification of the 1980 Decree. The persons who benefited from the District Court's class-wide remedy were neither alleged or proven victims of hiring discrimination, and the injunctions against the City's application of its seniority system in respondents' favor distorts the statutory purpose. The District Court's orders unnecessarily and inequitably trammel the interests of nonminority incumbent employees in contravention of and without concern for the principles inherent in the statute.

C. The Particular Concern Congress Expressed for the Operation of a Last-hired, First-fired Rule and the Special Status that Congress Accorded to Seniority Systems Must Be Given Great Weight by a Court When Crafting Affirmative Equitable Relief for Minority Employees.

In addition to the congressional revulsion toward quota remedies, the lower court should have given serious consideration in crafting relief to the particular congressional concern expressed in Title VII for the operation of a last-hired, first-fired seniority system such as was present in this case and for the "special status" that Congress had accorded to seniority systems. Indeed, the Court of Appeals disregarded both the history and purpose of §§ 703(h) and 703(j), 42 U.S.C. §§ 2000e-2(h), 2000e-2(j), and the decisions of this Court in failing to accord sufficient weight to the rights and interests of incumbent employees in the routine application of the city-wide seniority system under the instant circumstances.

1. *Section 703(h).* The plain language and legislative history of 703(h) of the Civil Rights Act of 1964 demonstrate that Congress intended to foreclose attacks under the civil rights laws on bona fide seniority systems. Section 703(h) provides that:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .

42 U.S.C. § 2000e-2(h). Thus, the language of § 703(h) indicates that the operation of a seniority system is not subject to attack unless it is motivated by an intent to discriminate. *See, e.g., Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). The District Court specifically found that the seniority system or layoff policy here under attack was not adopted with the intent to discriminate (Pet. A. 73). This finding was not challenged by respondents on appeal (Pet. A. 11 n.6). Thus the language of the statute instructs that the City's implementation of its proposed layoff policy would not have constituted a violation of the Act which might provide a predicate for additional relief beyond that provided in the 1980 Decree. Interestingly, the District Court found the seniority system non-bona fide because it had discriminatory effect (Pet. A. 74). Of course, this blatant error in light of *Teamsters* was reversed by the Court of Appeals, although it found the error to be so meaningless as to relegate it to a footnote in the opinion (Pet. A. 11 n.6).

This Court has had the occasion to examine the legislative history of § 703(h) on several previous occasions. *See, e.g., American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982). As noted in *Patterson*, § 703(h) was introduced as one of several Senate amendments to the initial bill passed by the House of Representatives, in response to charges that Title VII would destroy seniority rights.

See id. at 72. As part of the effort to clarify the intent and effect of the bill (an effort necessary to ensure its passage), Senator Clark, the floor manager of the bill, inserted three documents into the Congressional Record which the Court has characterized as "authoritative indicators" of the purpose of § 703(h). *Id.* at 73.

One of these documents was a Justice Department memorandum which stated, in part, that:

> If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by Title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white employers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex, or national origin. *It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is 'low man on the totem pole' he is not being discriminated against because of his race.* . . . Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title.

110 Cong. Rec. 7207 (1964) (emphasis added).[25] This memorandum is particularly pertinent herein, instructing that seniority-based layoffs would not contravene the polices of Title VII, even where those layoffs might perpetuate the effect of prior discrimination. As Justice Powell observed in *Franks*:

> The congressional debates leading to the introduction of § 703(h) indicate a concern that Title VII not be construed as requiring immediate and total restitution to the victims of discrimination regardless of cost in terms of other workers' legitimate expectations. Section 703(h) does not restrict the remedial

[25] The other documents submitted by Senator Clark are to similar effect. *See Patterson*, 456 U.S. at 73.

> powers of a district court once a discriminatory practice has been found, but neither are the concerns expressed therein irrelevant to a court's determination of "appropriate" equitable relief under § 706(g).

424 U.S. at 791-92 (Powell, J., concurring in part and dissenting in part). *See also Teamsters*, 431 U.S. at 372. ("Moreover, *after the victims have been identified and their rightful place determined*, the District Court will again be faced with the delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing" (emphasis added)). In the instant case there has been no finding of post-Act discrimination violative of the Act on the part of petitioners and no individual member of the respondent class has been adjudicated a victim. The legitimate expectations of nonminority incumbents cannot be forced equitably to yield to provide constructive competitive seniority to respondents.[26] As the 1980 Decree contains no grant of constructive competitive seniority, respondents simply must assume their place in the city-wide seniority system on the basis of their date of hire by the City with all attendant consequences.[27]

The Court recently discussed these same concerns in a different context:

> Although Title VII remedies depend primarily upon the objectives discussed above, the statute also permits us to consider the rights of "innocent third par-

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[26] Lower courts have expressly held that the permissible relief for actual discriminatees does not extend to "bumping" employees previously occupying jobs; victims must wait for vacancies to occur. *See, e.g., Patterson v. American Tobacco Co.*, 535 F.2d 257, 267 (4th Cir. 1976); *Paperworkers Local 189*, 416 F.2d at 988.

[27] In point of fact, the city-wide seniority system at issue herein is most equitable in its application to the respondents. The system does not place recently promoted blacks at a competitive disadvantage vis-a-vis their nonminority counterparts in the same rank. Instead, an employee's seniority is calculated in terms of his date of hire by the City for all purposes (J.A. 67, 103).

> ties." . . . The lower court's rule places a particularly onerous burden on the innocent employees of an employer charged with discrimination. Under the court's rule, an employer may cap backpay liability only by forcing his incumbent employees to yield seniority to a person who has not proven, and may never prove, unlawful discrimination. As we have acknowledged on numerous occasions, seniority plays a central role in allocating benefits and burdens among employees. In light of the "overriding importance" of these rights, *we should be wary of any rule that* encourages job offers that *compel innocent workers to sacrifice their seniority to a person who has only claimed, but not yet proven, unlawful discrimination.*
>
> The sacrifice demanded by the lower court's rule, moreover, leaves the displaced workers without any remedy against claimants who fail to establish their claims. *If, for example, layoffs occur while the Title VII suit is pending, an employer may have to furlough an innocent worker indefinitely* while retaining a claimant who was given retroactive seniority. If the claimant subsequently fails to prove unlawful discrimination, the worker unfairly relegated to the unemployment lines has no redress for the wrong done him. *We do not believe that " 'the large objectives' " of Title VII . . . require innocent employees to carry such a heavy burden.*

EEOC v. Ford Motor Co., 102 S.Ct. at 3069-70 (emphasis added). These same considerations apply with equal, if not greater, force in the instant circumstance. In this case the lower courts have abrogated the seniority of incumbent nonminorities in favor of individuals who have settled their claims short of adjudication, establishment of victim status or entitlement to constructive competitive seniority. The orders below impermissibly require innocent nonminority incumbents to carry a burden which is not theirs to bear.

2. *Section 703(j)*. In addition to the considerations and policy concerns expressed in § 703(h), the propriety of

the orders of the courts below must be weighed against similar congressional concerns expressed in § 703(j) of Title VII, 42 U.S.C. § 2000e-2(j), which states that Title VII shall not:

> be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed by any employer . . . in comparison with the total number or percentage of persons of such race . . . in the available work force in any community. . . .

In requiring the City to maintain the then existing percentages of blacks in each affected job classification, the orders of the District Court ran afoul of the very terms of § 703(j).

The legislative history of § 703(j) supports this conclusion. Like the legislative history of § 703(h), that of § 703(j) has been examined in depth by the Court. In *Weber*, the plurality and dissenting opinions all examined the legislative history of § 703(j) and concluded that the provision resulted from congressional concern that Title VII "would be interpreted to *require* employers with racially imbalanced work forces to grant preferential treatment to racial minorities. . . ." 443 U.S. at 205. *See also id.* at 217 (Burger, C.J., dissenting); *Id.* at 227-28 (Rehnquist, J., dissenting).

In light of the language and legislative history of Title VII, this Court has ruled that "[d]iscriminatory preference, for any group, minority or majority, is precisely and only what Congress has proscribed," *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), and that "Title VII prohibits racial discrimination against the white petitioners . . . upon the same standards as would be applicable were they Negroes. . . ." *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 280 (1976). This Court

has never interpreted Title VII to *require* preference based on race absent identified victims of discrimination.

In a case construing the permissibility of orders very similar to those in the case at bar, the Fifth Circuit has found such orders to be specifically prohibited by § 703(j). In *Watkins v. Steelworkers Local No. 2369*, 516 F.2d 41 (5th Cir. 1975), the court of appeals held that the district court's judgment requiring the reinstatement of black employees to achieve the racial balance existing prior to seniority-based layoffs was in error, stating:

> To hold the seniority plan discriminatory as to the plaintiffs in this case requires a determination that blacks not otherwise personally discriminated against should be treated preferentially over equal whites. . . . *The result which plaintiffs seek, therefore is not that personal remedial relief available under Title VII, but rather a preferential treatment on the basis of race which Congress specifically prohibited in section 703(j).*

Id. at 47 (emphasis added).[28] The orders of the District Court appealed from herein suffer from the same infirmity and must be reversed.

As Justice Powell stated in *University of California Regents v. Bakke*, 438 U.S. 265 (1978), "[r]acial and ethnic distinctions of *any sort* are inherently suspect and thus call for the most exacting judicial examination." *Id.* at 291 (emphasis added). In conducting such examinations this Court has refused to justify allegedly remedial actions solely on generalized societal discrimination. As Justice Powell pointed out in *Bakke*:

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[28] Similar conclusions have been reached on this and other grounds by three other court of appeals panels. *See Chance v. Board of Examiners*, 534 F.2d 993 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977); *Jersey Central Power & Light Co. v. Local Union 327, IBEW*, 508 F.2d 687 (3d Cir. 1975), *cert. denied*, 425 U.S. 998 (1976); *Waters v. Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976).

> *We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.*

Id. at 307 (emphasis added). Respondents herein must seek approval of just such a classification at the expense of innocent nonminority incumbents. Findings of violations sufficient to permit the displacement of innocent incumbents must be much more focused than a general finding of overall " 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past." *Id.* Such "focused" proof was not presented to the District Court by respondents.[29]

Bakke, and later *Fullilove v. Klutznick*, 448 U.S. 448 (1980), establish a fundamental prerequisite to the imposition of a racial preference classification—a finding of actual prior discrimination. Moreover, the preference must be "a limited and properly tailored remedy to cure the effects of prior discrimination" to pass constitutional muster. *Fullilove*, 448 U.S. at 484. The *Fullilove* court emphasized that the program approved there was very narrowly tailored so that only those minority businesses who had actually suffered from past discrimination would benefit from the quota imposed. In contrast, the preference imposed in the instant case is neither "limited," "properly tailored," based on findings of "prior discrimination," nor a "remedy." As such it must be reversed.

The lower courts have arrived at the wrong result in this case. They bypassed the required analysis and substituted for it their own subjective view of what is right and wrong under the circumstances. By ignoring the fundamental principles underlying Title VII jurispru-

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[29] Indeed, the evidence presented by respondents to the District Court included hiring statistics that dated back to 1950, some 22 years prior to the effective date of Title VII as to the City (Pet. A. 70-71).

dence as set forth above, the lower courts have engaged impermissibly in their own legislative endeavor. *See Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 95 (1981). The courts below have overstepped their authority and abused their discretion by judicially enlarging upon explicit limitations imposed by Congress on the general remedial provisions in the Act.

CONCLUSION

For the foregoing reasons, the judgment under review in Nos. 82-206 and 82-229 should be reversed.

Respectfully submitted,

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STATUTORY APPENDIX

STATUTORY APPENDIX

UNITED STATES CODE

42 U.S.C. § 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to

furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 2000e-2(a)

It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(h)

Notwithstanding any other provisions of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment

pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin. It shall not be unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

42 U.S.C. § 2000e-2(j)

Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section or other area.

42 U.S.C. § 2000e-5(g)

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

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Nos. 82-206 and 82-229

In the Supreme Court of the United States

October Term, 1983

FIREFIGHTERS LOCAL UNION NO. 1784,
Petitioner,

vs.

CARL W. STOTTS, et al.,
Respondents.

and

MEMPHIS FIRE DEPARTMENT, et al.,
Petitioners,

vs.

CARL W. STOTTS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONERS, MEMPHIS FIRE DEPARTMENT, et al.

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QUESTION PRESENTED

Did the trial court have the authority to modify a consent decree between a municipal employer and a class of black employees by enjoining the application of a layoff policy that is based upon a bona fide seniority system and by requiring layoffs to be based upon racial considerations, where the consent decree is silent with respect to the method to be used for layoffs and where there has been no judicial finding of racial discrimination?

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONERS, MEMPHIS FIRE DEPARTMENT, et al.

OPINIONS BELOW

The question presented derives from two orders entered by the United States District Court for the Western District of Tennessee, and the judgment of the United States Court of Appeals for the Sixth Circuit affirming those orders. The opinion of the Sixth Circuit below appears at 679 F.2d 541 and is reprinted in the appendix to

the petition for writ of certiorari filed by the municipal petitioners (City Pet. A1-71).[1] The orders of the district court (unpublished) are printed in the appendix to the petition for writ of certiorari (City Pet. A77-79, Order Granting Preliminary Injunction entered May 18, 1981; and A82-83, Order Expanding Preliminary Injunction entered June 26, 1981).[2] The oral ruling of the district court is printed at City Pet. A72-76.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The judgment of the court of appeals was entered on May 7, 1982. The petition for writ of certiorari was timely filed on August 4, 1982, and was granted on June 6, 1983.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are relevant portions of Title VII of the Civil Rights Act of 1964, as amended (hereinafter referred to as "Title VII"), 42 U.S.C. §2000e *et seq.*, specifically §§703(h), 703(j) and 706(g) thereof (42 U.S.C. §§2000e-2(h), 2(j) and 5(g)); the Civil Rights Act of 1866, 42 U.S.C. §1981; and the Civil Rights Act of 1871, 42 U.S.C. §1983. Sections 703(h) and (j), 706(g), and 42 U.S.C. §§1981 and 1983 are reproduced in Addendum A, hereto.

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1. The appendix to the petition for writ of certiorari filed by the municipal petitioners will be designated by the signal: "(City Pet. A)." The joint appendix submitted in this matter will be designated "(J.A.)."

2. An order was entered by the district court on June 23, 1981, enjoining the seniority-based reduction in personnel in three classifications (City Pet. A80-81). That injunctive relief was reiterated in the June 26 order, along with the court's approval of the modified seniority plan.

STATEMENT OF THE CASE

The instant controversy arose out of a 1980 consent decree entered into between the City of Memphis (hereinafter "City") and its black firefighters in settlement of a race discrimination lawsuit.

In 1977, a black Memphis fireman filed a class action alleging that the Memphis Fire Department had maintained racially discriminatory hiring and promotional practices in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §§1981 and 1983. In 1979, another black employee of the Memphis Fire Department filed a separate action alleging that he had been denied a promotion in the Department's Fire Prevention Bureau in violation of Title VII and 42 U.S.C. §1983. The cases were consolidated by the district court and settled less than a year later, before trial, when the district court approved a consent decree. The district court made no finding of discrimination by the City, and the decree contained no admission of discrimination. In fact, the decree provides:

> Defendants, by entering into this Consent Decree, do not thereby admit any violations of law, rule or regulation with respect to the allegations made by plaintiffs in their complaints (City Pet. A60).

The decree (hereinafter "1980 Decree") provided for promotions of 13 named individuals and payment of $60,000 in back pay to 81 Fire Department employees. Retroactive seniority was not given to any member of the class, which was defined as "all incumbent black employees of the Memphis Fire Department, all those black employees who will be employed there in the future, and all black persons who have been denied employment with the Memphis Fire Department since March 24, 1972." Notice of the settlement was mailed to each identified class member and

was posted in all engine houses of the Fire Department. Class members were given 15 days in which to file objections to the terms of the decree (City Pet. A69). No objections were filed by any class member.[3]

The 1980 Decree set forth a general, long-term minority hiring goal which paralleled an earlier hiring goal agreed to by the City in a consent decree entered into in 1974 in a case brought by the United States (hereinafter "1974 Decree").[4] The long-term goal established in both decrees obligated the City to increase the level of black representation in each job classification of the Memphis Fire Department to approximate the black representation in the labor force in Shelby County, Tennessee. An interim hiring ratio of 50% black personnel was included in both decrees as a means of achieving the long-term goal more quickly.[5] The 1980 Decree also included a 20% black promotional goal in each civil service classification within the Fire Department.[6] By the terms of the 1980 Decree, the minority class members agreed that they would "seek no further relief for the acts, practices or omissions alleged in the complaints save to enforce the provisions of this Decree, thereby waiving the right to seek further relief" (City Pet. A61).

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3. Several non-minority employees, however, unsuccessfully sought to intervene. *Stotts v. Memphis Fire Department*, 679 F.2d 579 (6th Cir.), *cert. denied sub nom., Orders v. Stotts*, 103 S.Ct. 297 (1982).

4. The 1980 Decree is set forth as an appendix to the opinion of the Court of Appeals, City Pet. A59-69; the 1974 Decree is set forth in its entirety at J.A. 98.

5. The 1974 Decree provided, however, "[a]ll of said goals are subject to the anticipated budgeted vacancies in the City" (J.A. 105, ¶10).

6. The inclusion of the promotional goal in the 1980 Decree was the only substantive addition to the affirmative action goals of the 1974 Decree. The hiring goal and the long-term goal remained unchanged. By its own terms, the 1980 Decree was "not intended to conflict with any provisions of the [1974] Decree;" rather, it was "intended to parallel and supplement the relief provided in that Consent Decree" (City Pet. A60).

Like the 1980 Decree, the 1974 Decree was entered into by the City and approved by the court prior to trial on the merits. The 1974 Decree specifically provided that the entry of the decree did not constitute an adjudication or admission of discrimination by the City.[7] The parties to both decrees waived all hearings, findings of fact and conclusions of law on all issues raised by the complaints. Neither decree included provisions concerning layoffs or reductions in rank, although the 1974 Decree did obligate the City to utilize a seniority system based upon City-wide seniority for various employment practices, including promotions, transfers and job assignments (J.A. 103, ¶6(a)). The 1974 Decree further provided that "[i]n no event shall the City be required to hire unnecessary personnel" (J.A. 101, ¶3), and that "[n]o specific numerical ratio for employment . . . of black firefighters shall be established unless the city fails in its good faith attempt to meet the interim goals [of increasing minority employment] . . ." (J.A. 105-06, ¶10).

In early May, 1981, the City announced that due to a substantial projected operating deficit for the 1981-82 fiscal year, a reduction in personnel in non-essential services would be necessary in all divisions of City government. To effectuate the reduction in personnel, the City promulgated a layoff policy in which layoffs and reductions in rank would be based upon City-wide seniority, determined from each employee's length of continuous service from

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7. The 1974 Decree provides: "The City of Memphis denies it has heretofore engaged in any pattern or practice of discrimination in hiring or promotion on the basis of race or sex but realizes that certain past practices of the City may have given rise to an inference that such practice may have occurred. . . .

"The City of Memphis and the United States, by agreeing to the issuance of this order, waive a hearing and finding of facts and conclusion of law on all issues raised by the Complaint . . . and the parties have mutually agreed to the entry of the consent decree, which shall not constitute an adjudication or admission by the City of any violation of law or findings on the merits of this case" (J.A. 99).

latest date of permanent employment (J.A. 85, ¶3). Employees in ranking positions possessed "bumping rights," *i.e.*, they could choose to "bump down" to a lower-ranking position rather than face layoff. The layoffs were scheduled for June 26, 1981, the ending pay period in the 1980-81 fiscal year.

The layoff policy adopted by the City was consistent with the Memorandum of Understanding between the City and Local 1784 of the International Association of Firefighters (hereinafter "Union"), which provided that seniority would govern layoffs and recalls (J.A. 119, Art. XIX, §5). "Seniority" was referred to as City-wide seniority (J.A. 117, Art. XIX, §1).

On May 4, 1981,[8] plaintiffs moved in the *Stotts* case for a temporary restraining order enjoining the City from laying off or reducing in rank any black employee in the Memphis Fire Department, because the layoffs would impair the results then achieved under the 1980 Decree. The following day, the Union (which had not been a party to the 1980 Decree) intervened by consent of the parties, and on May 8 a hearing was held on plaintiffs' request for preliminary injunctive relief.

The evidence adduced at the May 8 hearing revealed that approximately 450 City-funded positions within the various departments of City government were to be eliminated (J.A. 55).[9] Approximately 220 of the 450 positions were actually filled at that time; the remaining positions were funded but vacant. Within the Fire Department, 55 then-filled positions were to be eliminated, along with a significant number of funded but vacant positions (J.A. 55).[10]

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8. Unless otherwise specified, all dates hereinafter refer to 1981.

9. A total of almost 1,000 positions, City-wide, were scheduled to be abolished (J.A. 54).

10. The Fire Department then employed over 1500 persons (Hearing Ex. 3, see p. 186 of the joint appendix in the Sixth Circuit).

It was estimated that 39 positions to be eliminated in the Fire Department were filled by employees who possessed bumping rights, enabling them to bump to a lower-ranking classification rather than be laid off. It was also estimated that approximately 40 Fire Department privates would ultimately be laid off. The 40 least senior employees on the seniority roster consisted of 25 white and 15 black employees(J.A. 68) These figures were based on preliminary forecasts and were subject to change due to attrition and the possibility of individuals choosing retirement rather than exercising their bumping rights.[11]

The evidence also showed that approximately 56% of the employees hired into the Fire Department since the entry of the 1974 Decree were black (J.A. 48).[12] The per-

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11. Under the last-hired, first-fired seniority system, the projected layoffs and/or demotions in the affected classifications were to be as follows:

		Present	Positions Eliminated	
Lieutenants	white	211	1	
	black	29	16	
	total	240	17	
Drivers	white	296	7	
	black	15	10	
	total	311	17	
Inspectors	white	14	3	
	black	6	0	
	total	20	3	
Privates	white	497	25	
	black	85	15	
	total	582	40	(laid off)

12. According to the Tennessee Department of Employment Security, Tennessee Data for Affirmative Action Plans, 6th Edition (1980), non-whites constituted 32.8% of the total civilian labor force of Memphis, Shelby County, Standard Metropolitan Statistical Area (SMSA). These population figures were based on 1978 data.

centage of black employees in the Memphis Fire Department had increased from approximately 3% or 4% in 1974 to 11-1/2% in 1980. It was estimated that the seniority-based reduction in force would have resulted in a one percent (1%) decrease in minority employment in the Fire Department (J.A. 54).

At the conclusion of the hearing, the district court enjoined the City from implementing the seniority-based reduction in force under the last-hired, first-fired seniority policy within four classifications and instructed the City to propose a layoff policy consistent with the injunction (City Pet. A72, oral ruling; A77, written order). The court found that the layoff policy was not adopted with the intent or purpose to discriminate, but nevertheless concluded that it was not a bona fide seniority system because its *effects* were discriminatory.

On June 23, the district court expanded its order to include three additional classifications: supervisor-fire prevention, fire alarm operator I and clerk typist.[13] At that

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13. The evidence revealed that the racial composition of the positions, and the planned layoffs were as follows:

		Present	Positions Eliminated
Supervisor-Fire Prevention	white	4	1
	black	1	1
	total	5	2
Fire Alarm Operator I	white	3	0
	black	4	2
	total	7	2
Clerk Typist	white	3	1
	black	6	0
	total	9	1

The clerk typist position was not actually affected by the court's orders as the original seniority system did not operate so as to reduce the percentage of minority employees.

time, the City orally presented its modified layoff plan for approval. By order entered June 26, the district court approved the modified seniority plan, and the City proceeded with the reduction in force. The reduction in force was still based upon seniority. However, junior black employees in the seven classifications affected by the injunction were protected so as not to reduce the percentage of minority employees in those classifications. Thus, non-minority employees with greater seniority than the skipped-over minority employees were laid off or reduced in rank. The actual layoffs under the court's orders are listed in Addendum B, hereto.[14]

On May 7, 1982, the United States Court of Appeals for the Sixth Circuit affirmed the orders of the district court. 679 F.2d 541 (Martin J., concurring in part, dissenting in part). The court of appeals found that the district court's holding that the layoff system was not bona fide was erroneous in the face of the uncontroverted fact that the system was adopted without discriminatory intent or purpose. Nevertheless, the court upheld the district court's action in modifying the consent decree and altering the existing seniority provisions between the City and the Union (which had not been a party to the 1980 Decree). Judge Martin concurred in the result only and dissented from the majority's holding that the district court could alter the existing seniority rights through modification of the 1980 Decree where no finding of discrimination had been made. 679 F.2d at 568-69.

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14. Due to the difficult nature of identifying the actual employees to be affected and uncertainty as to who would or would not exercise their bumping rights the City could not provide an actual list of affected employees to the court. Only after the reduction in force was implemented was a final list available. This list was not included in the record in the district court but is included herein to assist in the Court's understanding of the factual issues below.

SUMMARY OF ARGUMENT

I. The modification of the 1980 Decree to enjoin the use of a bona fide seniority-based layoff system was not warranted by the Sixth Circuit's erroneous construction of the Decree, nor by the principle of changed circumstances. The court of appeals erroneously construed the 1980 Decree as requiring the City to maintain a certain level of minority employment. However, an examination of the Decree reveals that it had no such purpose; rather, the parties had agreed to specific affirmative hiring and promotion methods to achieve the stated goal of the Decree. The court of appeals' newly-fashioned obligation requiring the maintenance of a certain level of minority employment constitutes an improper judicial modification by construction. *Hughes v. United States*, 342 U.S. 353 (1952).

Nor does the principle of changed circumstances support modification in this case. The reduction in personnel under a bona fide seniority system did not transform the Decree into an instrument of wrong. The City remained obligated to increase minority employment through the agreed affirmative hiring and promotional goals, and there was no evidence that the City did not or would not continue to abide by its agreement. The unintended and temporary delay in achieving the long-term goal, resulting from economic conditions beyond the control of the City, did not so thwart the purpose of the Decree as to require judicial modification.

II. Even had changed circumstances warranted modification of the 1980 Decree, the district court exceeded its remedial authority by overriding the operation of a bona fide seniority system. Under Title VII, a district court's equitable authority must be drawn from the objectives of

the statute—to make victims of discrimination whole. As there was no finding by the district court that the minority employees protected from layoff in this case were victims of past hiring discrimination, the district court's award of relief exceeds the scope of its equitable authority under §706(g). *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

The Sixth Circuit completely ignored the specific immunization afforded bona fide seniority systems by Congress under §703(h). As there was no showing that the system was adopted with the intent to discriminate, the court's abrogation of the bona fide seniority system was improper. Moreover, the district court's requirement that the City insulate minority employees from the operation of a bona fide seniority system, without a finding of unlawful discrimination, constitutes a judicially-imposed preference in direct contravention of the express terms of §703(j).

III. Policy considerations also require reversal of the court's unsupported modification of the Decree. Here, the court's willingness to impose new obligations on a party to a consent decree, without a finding that the party has breached the terms of the decree, or without any finding of a new violation that would warrant modification, will have a chilling effect on the use of consent decrees to settle discrimination lawsuits.

IV. The district court's abrogation of a bona fide seniority system constitutes an improper judicial intrusion into the affairs of local government. Although the Decree provided for retention of jurisdiction for entry of orders necessary to effectuate the purpose of the Decree, that provision cannot be read as a retention of jurisdiction to expand or change that purpose. The City had implemented the non-discriminatory policies required by the De-

cree, and there was no evidence that the City had otherwise defaulted under its legal obligations. The district court improperly usurped the managerial prerogatives of local authorities by enjoining the use of a bona fide seniority system and expanding the Decree to require a certain level of minority employment.

ARGUMENT

I. THE DISTRICT COURT ERRED IN MODIFYING THE 1980 CONSENT DECREE TO PRECLUDE A REDUCTION IN FORCE PURSUANT TO A BONA FIDE SENIORITY SYSTEM WHERE THAT DECREE DID NOT PRECLUDE SENIORITY-BASED LAYOFFS.

This case presents the question as to the extent of the equitable power of the judiciary to impose (through modification of a consent decree) a type of unbargained for affirmative action on a party, despite the congressionally-mandated restrictions on the equitable authority of courts under Title VII. The City submits that judicial modification of the 1980 Decree to enjoin seniority-based layoffs for the purpose of maintaining a certain level of minority employment was improper.

A. The Consent Decree Does Not Impose an Obligation on the City to Deviate From Its Bona Fide Seniority System.

The Sixth Circuit's decision correctly noted that the 1980 Decree obligated the City to engage in certain affirmative action in hiring and promotional decisions to ultimately achieve a level of minority employment approximating that in the civilian labor force. The court, however, erroneously construed this obligation as a guarantee of a minimum level of minority employment in the event of layoffs and concluded that seniority-based layoffs could be precluded if minority employment was adversely affected. The court did not construe the Decree as written but, rather, as the court felt it should have been written by the

parties.[15] This judicial rewriting of the Decree contravenes the directives of both Congress and this Court.

In *United States v. Armour & Co.*, 402 U.S. 673 (1971), the Court detailed the proper approach for a court to follow in construing a consent decree:

> Thus the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed *as it is written, and not as it might have been written* had the plaintiff established his factual claims and legal theories in litigation. *Id.* at 681-82 (footnote omitted; last emphasis added).

The court of appeals incorrectly substituted its judgment for the specific agreement of the parties. Such judicial modification disguised as construction is not proper. *United States v. Atlantic Refining Co.*, 360 U.S. 19 (1959); *Hughes v. United States*, 342 U.S. 353 (1952).

The language of the Decree reveals that the purpose of the parties was to raise the level of minority representation in the Memphis Fire Department by setting affirma-

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15. The City submits that the court's invalidation of the bona fide seniority system would have been impermissible even if plaintiffs had prevailed in litigation. See Section II, *infra*.

tive hiring and promotional goals, a purpose which remains in full force and effect. By entering into this compromise, it was *not* the City's intent to guarantee a certain level or percentage of minority employment at all times and at the expense of non-minority employees.[16] Further, the court's imposition on the City of a new obligation to maintain a level of minority employment in the event of a reduction in force also runs contrary to the City's previously negotiated agreement with the Union providing for a method to be used for layoffs.[17] The 1980 Decree's silence regarding layoffs in no way manifests an intent to cancel the terms of its existing contract. Thus, the court's reading of the 1980 Decree so as to preclude seniority-based layoffs departs from standard precepts of contract construction which are traditionally applied to consent decrees. *See United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975).

A similar expansive reading of a consent decree was rejected by this Court in *Hughes v. United States*, 342 U.S. 353 (1952). In *Hughes*, a district court approved a modification of a consent decree entered into in settlement of

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16. This conclusion is supported by the testimony of the Mayor of Memphis, who specifically stated that he would not have agreed to a layoff policy other than by seniority: "It is my opinion that under the Consent Decree, we agreed to hire, we agreed to promote, and we agreed to do it in percentages, or what have you. . . . But I certainly felt differently towards any policy that would put people out of work, put them on the street, based on anything other than the thing that has been used in every city in this country, . . . and by the city [of Memphis], and in the Consent Decree since 1974, and that is the seniority policy in the union agreement. . . ." (J.A. 37-38).

17. Additionally, the 1974 Decree reveals that the goals of minority staffing were subject to anticipated budgeted vacancies and were not to conflict with employment expectations of non-minority employees (see ¶10 of 1974 Decree, J.A. 105). Nor did the 1974 Decree require the hiring of unnecessary personnel in order to meet the interim goals (J.A. 101, ¶3), or the establishment of a specific numerical ratio of black firefighters (J.A. 105-06, ¶10).

an antitrust action to compel the divestment of stock by Howard Hughes. The lower court reasoned that the divestiture was necessary to achieve the basic purpose of the decree, which was explained as the divorcing of production-distribution companies from theater exhibition companies. This Court reversed, holding that the court erred in substituting its own means to achieve the purpose of the decree where the parties had provided their own detailed plans to resolve the dispute. *Id.* at 357. As in *Hughes*, the parties here have negotiated specific means to achieve their purpose of raising minority employment in the Memphis Fire Department, and the court had no authority to impose additional obligations in order to achieve its own desired "purpose" of the Decree.

The Sixth Circuit's rationale in construing the silence of the 1980 Decree to proscribe seniority-based layoffs had been previously rejected by a different panel of the Sixth Circuit in *Brown v. Neeb*, 644 F.2d 551 (1981). There, Judge Brown, writing for the majority,[18] stated:

> This consent decree is absolutely silent with respect to layoffs. In order to construe it to proscribe layoffs on the basis of seniority in spite of its silence, we have to construe it by implication to provide that the City of Toledo was to forego the right to layoff at all unless it laid off other than on the basis of seniority in which case it would be laying off contrary to its collective bargaining contract. . . . To me, this is not a reasonable construction of the consent

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18. West's Federal Reporter mistakenly describes Judge Brown's opinion as a concurrence. It was, in fact, the majority opinion. *See* the concurring and dissenting opinion of Judge Martin in *Stotts v. Memphis Fire Department*, 679 F.2d at 568; *Oliver v. Kalamazoo Board of Education*, 706 F.2d 757, 764 n.7 (6th Cir. 1983) (Brown, J.); Hamburger, *Alternatives to Seniority-Based Layoffs: Reconciling* Teamsters, Weber *and the Goal of Equal Employment Opportunity*, 15 U. Mich. J. L. Ref. 523, 536 n.76 (1982).

> decree. On the contrary, if layoffs had been within the contemplation of the parties at the time they negotiated and submitted the consent decree, *such would have been covered in the decree.* *Id.* at 564-65 (emphasis added).

In *Brown*, however, the court approved injunctive relief to enjoin the layoffs because of the City of Toledo's failure in meeting its affirmative obligations under the decree.[19]

The court of appeals failed to even mention in its lengthy opinion in this case an earlier decision of the Sixth Circuit which, under quite similar facts to those here, also reached the opposite conclusion. In *Youngblood v. Dalzell*, 568 F.2d 506 (6th Cir. 1978), the court refused to enjoin seniority-based layoffs in light of a consent decree which was silent on the issue of layoffs. The court properly found that, as the "negotiated product did not commit the City to hire any specific number of minority firemen nor commit the City to any policy at all in relation to forced employment reduction and layoffs," an expansive reading of the consent decree to include such obligation was not justified. *Id.* at 508.

Similarly, in *Jersey Central Power & Light Co. v. Local Union 327, I.B.E.W.*, 508 F.2d 687 (3rd Cir. 1975), *cert. denied*, 425 U.S. 998 (1976), the court held that a conciliation agreement among employer, unions and the EEOC, setting forth a program to increase the percentage of minority and female employees by affirmative hiring and

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19. To support its conclusion, the court below stated that the instant factual situation was virtually identical to that in *Brown*. In fact, there are critical factual distinctions between the two cases. In *Brown*, the court found that the City of Toledo had not made a good faith effort to comply with its obligations under the decree. Additionally, the parties did not include an exculpatory or non-admission clause in that decree. Both crucial factors are absent here. Indeed, the record demonstrates conclusively that the City complied with the terms of the Decree.

promotion action, should not be construed to prevent the operation of a bona fide seniority system for reduction of personnel, even though the layoffs had a discriminatory impact on the minority and female employees. The court based its holding on the fact that the conciliation agreement did not contain any express seniority provision or expressly modify or alter the seniority provisions found in the collective bargaining agreement between the employer and the unions. *Id.* at 695-96.

The sound reasoning of *Neeb, Youngblood* and *Jersey Central Power* regarding construction of consent decrees is equally applicable here. The court of appeals' strained interpretation of the 1980 Decree creating a *new* obligation to maintain a level of minority employment contravenes this Court's holding in *Armour* and must be reversed.

B. The Court's Reliance on Changed Circumstances to Support Modification of the Consent Decree Is Misplaced.

The court of appeals, perhaps realizing that its construction of the 1980 Decree to expand the obligations of the City was suspect, offered another basis for judicial modification of the Decree, that of changed circumstances. *Stotts,* 679 F.2d at 562-63. Although the court purportedly predicated its decision on this Court's long-established doctrines governing modification of consent decrees due to changed circumstances, the court misapplied those very principles.

In *United States v. Swift & Co.*, 286 U.S. 106 (1932), this Court declared that a court may revoke or modify a consent decree if changed circumstances had transformed the original decree into an instrument of wrong. However, the Court cautioned that modification should not be predicated on anything "less than a clear showing of

grievous wrong evoked by new and unforeseen conditions." *Id.* at 119. The power to modify the terms of a consent decree due to changed circumstances is not to be exercised lightly. *EEOC v. Safeway Stores*, 611 F.2d 795, 799 (10th Cir. 1979), *cert. denied*, 446 U.S. 952 (1980). Here the court of appeals held that the intervening economic crisis of the City and the resulting layoffs were unforeseen circumstances which would have impaired the affirmative action previously achieved under the Decree. 679 F.2d at 563.[20] The City respectfully submits that the court's conclusion as to the discriminatory effects of the reduction in rank does not support judicial modification of the 1980 Decree—imposing a new obligation on the parties—which exceeds the bounds of that court's remedial authority.

Here, the 1980 Decree was not transformed into an instrument of wrong. Under the Decree, the City agreed to meet minority hiring and promotional goals, which the City has met and to which the City remains committed. There was no suggestion that the City would repudiate its hiring and promotional obligations, nor has the City done so.[21]

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20. Although the reduction in force was unforeseen, it was not unforeseeable. The parties did not anticipate an economic downturn which caused the reduction in force, but the parties could have provided for such event had they wished. *See EEOC v. McCall Printing Corp.*, 633 F.2d 1232 (6th Cir. 1980); *Airline Stewards and Stewardesses v. American Airlines*, 573 F.2d 960 (7th Cir.), *cert. denied*, 439 U.S. 876 (1978). Further, it should be noted that the City had negotiated an agreement with the Union in 1975 regarding reductions in force and had reaffirmed that agreement in the 1978-1981 Memorandum of Understanding. Thus, the parties' failure to negotiate provisions concerning reduction in personnel or constructive seniority should be seen as a result of a compromise negotiated at arms' length between the parties, and the court should not now be allowed to rewrite the City's obligations as set forth in the 1980 Decree under the guise of changed circumstances.

21. Although the Sixth Circuit termed the 1981 announcement of the reduction in force as an anticipatory repudiation of both the 1974 and 1980 Decrees, 679 F.2d at 561, since 1981, the City has exceeded the 50% minority hiring goals set forth under both decrees.

Moreover, the Decree itself could not be considered as an instrument of wrong merely because it did not preclude the lawful use of a bona fide seniority-based layoff system.[22]

In a closely analogous case, the Court of Appeals for the Third Circuit reversed a district court's modification of a consent decree which would have imposed additional obligations on a party. In *Fox v. United States Department of Housing*, 680 F.2d 315 (3rd Cir. 1982), the parties voluntarily entered into the consent decree prior to an adjudication of the plaintiffs' claims, and the defendants did not admit any violation of applicable laws. Due to the subsequent unexpected climb in interest rates, the plaintiffs sought to have the decree modified to require the defendants to provide a particular method of financing as to which the decree was silent. In noting that there was no adjudication or admission that the defendant had violated the plaintiffs' legal rights, the Third Circuit rejected the plaintiffs' claim that modification of the decree was warranted, stating:

> The contention is solely that the plaintiffs' expectations have been frustrated by changes in the mortgage market, changes beyond the control of the defendants that might have been anticipated by the plaintiffs. To impose additional duties under the decree because of those changes is to disregard the basic rights of litigants who waive their right to litigate defenses by consenting to have a decree entered against them.

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22. Significantly, although the 1974 Decree also dictated the same affirmative hiring measures as the 1980 Decree, the United States, plaintiff in the earlier action, neither filed suit nor sought to intervene in the request for injunctive relief. Indeed, it is petitioner's understanding that the United States intends to submit an *amicus curiae* brief on behalf of the City in this matter.

> The conditions upon which rights are waived must be respected. *Id.* at 323 (citations omitted).

As in *Fox*, the temporary delay in achieving the long-term goal, due to economic circumstances beyond the control of the City, does not warrant modification of the Decree.

It is especially ironic that the seniority-based layoffs enjoined below would have had no greater long-term adverse effect on the City's compliance with its obligation to increase minority employment under the 1980 Decree than would the layoff plan imposed by the district court. Under both layoff plans, the City would first recall and promote those employees affected by the reduction in force. Thus, before any further progress was made by the City toward achieving the long-term goal, the affected employees would be returned to their previous jobs. New hiring would be equally delayed because of the economic conditions regardless of the policy used, and renewed implementation of the affirmative hiring goals would occur at precisely the same moment under either plan. Thus, the original layoff plan cannot be interpreted as thwarting the basic purpose of the decree so as to justify its judicial modification. *See Chrysler Corporation v. United States*, 316 U.S. 556, 562 (1942); *United States v. Swift & Co.*, *supra*.

II. THE COURT ERRONEOUSLY ENJOINED THE USE OF A BONA FIDE SENIORITY SYSTEM WITHOUT A FINDING OF UNLAWFUL DISCRIMINATION AGAINST THE CITY.

Even assuming, *arguendo*, that the district court possessed the power to modify the 1980 Decree, the court exceeded its equitable authority by enjoining the use of a bona fide seniority system. In effect, the modification insulated minority employees from layoffs or reductions in rank solely because of their race, despite a finding that

the layoff policy was adopted without a discriminatory intent and in the absence of any findings that the employees so protected were victims of unlawful discrimination. Due to the court's misapplication of the controlling law, as set forth by this Court, the modification of the 1980 Decree to override the bona fide seniority system must be reversed.

The court of appeals brushed aside arguments that modification of the 1980 Decree to require that layoffs be based on race constituted an award of constructive seniority to non-victims in contravention of this Court's holdings in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), and *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976). The Sixth Circuit, without attempting to reconcile its decision with prior holdings of this Court, merely stated that the parties' reliance on *Teamsters* and *Franks* was "misplaced." *Stotts*, 679 F.2d at 564.

The court of appeals advanced three theories to justify its decision: 1) a settlement theory, 2) a fictional remedial award theory, and 3) a judicial derivative power theory. Each theory, however, ignores the facts of this case, and none provides support for the court's decision.

The settlement theory is premised on the existence of a voluntary settlement regarding seniority claims, a fact absent from this case. The court's reliance on *Airline Stewards and Stewardesses v. American Airlines*, 573 F.2d 960 (7th Cir.), *cert. denied*, 439 U.S. 876 (1978), is misplaced. Unlike American Airlines, the City has never agreed to a modification of its existing seniority policy. Secondly, the court surmised that, if a constitutional violation had been established by the original plaintiffs, the court would have had the authority to award the relief granted herein. The simple answer is, however, that no such violation was established. For the court to now

assume that the City was guilty of discrimination and had violated the constitutional rights of its employees, in the absence of trial and judgment, is a wholly improper exercise of judicial power. The assumption also utterly ignores the policy considerations underlying consent decrees. *See United States v. Armour & Co.*, 402 U.S. 673 (1971); *Fox v. United States Department of Housing*, 680 F.2d 315 (3rd Cir. 1982). Finally, the court's creation of a purported derivative power conferred upon the court under the consent decree is imaginative but unfounded. In effect, the court concludes that the City has surrendered its managerial prerogatives to the court under the decree and, because the City would have the right to *voluntarily* modify the seniority system without violating Title VII, the court could likewise act. Neither the consent decree nor any case or statutory law supports the existence of such a derivative power to compel modification of a seniority system over the objection of a party and without a finding of discrimination.

A. The Abrogation of the Bona Fide Seniority System Exceeded the Court's Remedial Authority Under §§703(h) and 706(g) of Title VII.

Although a court's remedial powers may be broad, they are not plenary. *See Hills v. Gautreaux*, 425 U.S. 284, 293 (1976). The scope of the equitable powers of a court to enforce substantive rights must be drawn from the statute creating those substantive rights. *See Teamsters v. United States*, 431 U.S. 324, 364 (1977); *System Federation No. 91 v. Wright*, 364 U.S. 642, 651 (1961). A court's remedial authority to enforce Title VII is contained in Section 706(g) of Title VII, 42 U.S.C. §2000e-5(g), which provides, in part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful

> employment practice charged in the complaint, the court may enjoin the respondent in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include . . . reinstatement, or hiring of employees . . . or any other equitable relief as the court deems appropriate. . . .

Congress, however, limited the equitable powers of a court by the last sentence of §706(g), which reads: "No order of the court shall require the . . . hiring, reinstatement, or promotion of an individual as an employee . . . if such individual . . . was suspended or discharged for any reason other than discrimination on account of race. . . ."

Once the equitable powers of court have been invoked under Title VII, judicial exercise of that authority requires "the principled application of standards consistent with [congressional] purposes and not 'equity [which] varies like the Chancellor's foot.'" *Ford Motor Co. v. EEOC*, 102 S.Ct. 3057, 3063 (1982), quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975). The express congressional limitations under §706(g) permit the courts to fashion appropriate relief to make *victims* of discrimination whole but do not allow the "remedial" awards of employment or reinstatement to *non*-victims.[23]

The legislative history of §706(g) supports this conclusion. During the congressional debate over the passage of Title VII, Senators Clark and Case, the bi-

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23. Although this action was brought pursuant to Title VII and 42 U.S.C. §§1981 and 1983, there is no distinction in a court's equitable authority under the statutes. *Gurmankin v. Costanzo*, 556 F.2d 184, 188 (3rd Cir. 1977), *cert. denied*, 450 U.S. 923 (1981). Thus, the proper scope of the court's equitable power will be examined in light of the statutory objectives of Title VII rather than §§1981 and 1983, which require a heavier burden of proof than that of Title VII. *See Washington v. Davis*, 426 U.S. 229 (1976); *General Bldg. Contractors Ass'n v. Pennsylvania*, 102 S.Ct. 3141 (1982).

partisan "captains" for Title VII, entered an interpretive memorandum into the Congressional Record. The memorandum, characterized by this Court as one of the "authoritative indicators" of the meaning of Title VII (*see American Tobacco Co. v. Patterson*, 456 U.S. 63, 73 (1982), and *Teamsters*, 431 U.S. at 352), explained the remedial limitations contained in §706(g):

> No court order can require hiring, reinstatement, admission to membership, or payment of back pay *for anyone who was not discriminated against in violation of this title.* This is stated expressly in the last sentence of section [706(g)] which makes clear what is implicit throughout the whole title; that employers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because of race. . . .

110 Cong. Rec. 7214 (1964) (emphasis supplied); *see also* remarks of Senator Humphrey, *id.* at 6549. Later, in passing the 1972 amendments to Title VII, which more broadly defined the equitable power of the courts, Congress reaffirmed the equitable limitations under §706(g) to make *victims* of discrimination whole, as set forth in the Section-by-Section Analysis introduced by Senator Williams:

> In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination. 118 Cong. Rec. 7168 (1972).

The clear objective of Title VII, to provide remedies only for *victims* of unlawful discrimination, has been recognized by this Court in numerous decisions. In *Albemarle Paper, supra,* the Court identified the central purposes of Title VII: to eradicate discrimination in employment and to make persons whole for injuries suffered through past discrimination. 422 U.S. at 421. In *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), this Court viewed the 1972 amendment to Title VII as an "emphatic confirmation that federal courts are empowered to fashion such relief . . . making whole insofar as possible the *victims* of racial discrimination in hiring." *Id.* at 764 (emphasis added). Recently, in *Ford Motor Co. v. EEOC*, 102 S.Ct. 3057, 3065, this Court reiterated that view: "Title VII's secondary, fallback purpose is to compensate the *victims* for their injuries" (emphasis added). *See also Zipes v. Trans World Airlines*, 455 U.S. 385, *reh'g denied*, 102 S.Ct. 2001 (1982).

In the instant case, however, there has been no finding by any court that the minority employees who were insulated from the operation of a bona fide seniority system were in fact victims of prior discrimination. Affording relief to non-victims does not comport with the "make-whole" purpose of Title VII, and in fact conflicts with congressional purpose as clearly expressed in the statute and as equally clearly expounded by this Court in prior cases.

Nowhere is a court's power to grant remedial, "make-whole" relief under Title VII more expressly limited than in the area of seniority relief. This Court has repeatedly recognized the "overriding importance" of seniority provisions in collective bargaining agreements. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 76 (1982), citing *Humphrey v. Moore*, 375 U.S. 335, 346 (1964), and *Trans World Airlines v. Hardison*, 432 U.S. 63, 79 (1977).

Such seniority provisions have engendered strong expectations and have received wide acceptance within the field of labor relations. *Oliver v. Kalamazoo Board of Education*, 706 F.2d 757, 763 (6th Cir. 1983); Summers and Love, *Work Sharing As an Alternative to Layoffs by Seniority: Title VII Remedies in Recession*, 124 U. of Pa. L. Rev. 893, 899-906 (1976).

Congress recognized the unique status of seniority provisions in employment relationships, and recognized also the possible conflict between seniority rights and Title VII. Congress resolved that policy conflict by explicitly granting to bona fide seniority systems immunity from attack. *See Teamsters*, 431 U.S. at 350. Section 703(h) of the Act provides, in part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation or different terms, conditions, or privileges of employment pursuant to a bona fide seniority system, . . . provided that such differences are not the result of an intention to discriminate because of race . . .

Under §703(h), discriminatory *effects* of the operation of a bona fide seniority system are insufficient to warrant abrogation of the seniority system; rather, a finding of discriminatory *purpose* in the adoption of such system is necessary to enjoin its operation. *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). This protection against attack applies equally to all seniority systems whether promulgated before or after enactment of Title VII. *American Tobacco Co. v. Patterson*, 456 U.S. at 75-76. Thus, judicial abrogation of seniority systems without an adjudication of discriminatory purpose is improper.

This Court's earlier holdings in *Franks*, *Teamsters*, and *Zipes*, *supra*, and *United Air Lines v. Evans*, 431 U.S. 553 (1977), clearly establish that a court may properly award constructive seniority as a remedy to identifiable victims of discrimination but may not otherwise impair the operation of a bona fide system. Persons adjudicated to be victims of discrimination may be judicially "slotted" into their "rightful place" on the seniority roster, precisely in order to permit future operation of the seniority system as a means of fairly allocating employment benefits and rights. *See Franks*, 424 U.S. at 764-66. Because the Sixth Circuit specifically recognized that the seniority-based layoff policy was bona fide, the court erred in ignoring the congressional mandated protection afforded to that system by §703(h).

Last term this Court unequivocally explained that "constructive seniority can only be viewed as compensation for a past wrong." *Guardians Ass'n v. Civil Service Commission of New York*, 51 U.S.L.W. 5105 (U.S. July 1, 1983). The compensatory nature of seniority relief has been previously noted by this Court in defining the permissible extent of a court's remedial powers. *Franks* held that an award of constructive seniority may be a proper form of relief to identifiable victims of discrimination, but cautioned that "evidence that particular individuals were not in fact victims of racial discrimination will be material." 424 U.S. at 772. The following year, in *Teamsters*, this Court approved an award of retroactive seniority but carefully noted that the district court on remand would be required to determine individually which of the minority employees were *actual victims* of discrimination.[24] 431

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24. Although the decree in *Teamsters* did not constitute an adjudication of discrimination, the consent decree was entered into only after summary judgment was granted in favor of the plaintiffs, and the decree explicitly provided for the district court to identify the *actual discriminatees* in order to fashion the appropriate remedy. 431 U.S. at 330 n.4.

U.S. at 371-72. *See also United Air Lines v. Evans*, 431 U.S. 553, 559 (1977). More recently, in *Zipes v. Trans World Airlines*, 455 U.S. 385 (1982), this Court approved a remedial award of retroactive seniority to a class of victims of discrimination. The concurring opinion of Justice Powell, in which the Chief Justice and Justice Rehnquist joined, emphasized that "a violation of Title VII is a *prerequisite* to disturbing rights under a bona fide seniority system protected by §703(h)." *Id.* at 401 (emphasis added). Thus, the holdings of this Court have consistently interpreted §703(h) as precluding precisely what the court below affirmed—an award of constructive seniority to persons who have not been adjudged victims of past discrimination.[25]

In this case, there has never been an adjudication or finding of unlawful discrimination by the City. The City has never admitted that it has engaged in any unlawful employment practice, and the City has never agreed to a modification of its seniority system. Despite finding that the City's seniority-based layoff policy was bona fide, the court below nevertheless rewrote that policy in an unwarranted expansion of the equitable powers granted by Congress under Title VII.

The court of appeals also erroneously concluded that its modification of the seniority system would have been well within its equitable power if discrimination by the City had been established. *Stotts*, 679 F.2d at 566. However, this Court's decisions establish that the court would not

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25. The final layoff list, Addendum B, indicates that the minority employees afforded protection against layoff were not victims of hiring discrimination. All privates laid off have seniority dates of 1979 or after. The evidence adduced at the hearing on plaintiffs' request for injunctive relief established that the City had a 56% minority hiring rate since 1974, far exceeding the minority percentage within the civilian labor force.

have had the authority to grant such a "remedy" to *non*-victims under Title VII, even had the controversy below been litigated.[26] This Court has never approved such an exercise of equitable authority to afford benefits to persons solely on account of their race and regardless of whether or not they had been victimized by discrimination.

B. The Court's Modification of the Seniority System Constitutes a Judicially-Mandated Preference Based on Race in Direct Violation of §703(j).

Because no finding of unlawful discrimination against the affected minority employees had ever been made, the district court's modification of the seniority system to maintain a specific percentage of minority employment constitutes an award of preferential status in violation of the express terms and objectives of Title VII. Section §703(j) provides, in part:

> Nothing contained in this title shall be interpreted to *require* any employer . . . subject to this title to grant any preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed by any employer . . . in comparison with the total number or percentage of persons of such race . . . in the available work force . . . . (Emphasis added.)

The language of §703(j) is free from doubt and "must be taken as the final expression of the legislative intent." *Caminetti v. United States*, 242 U.S. 470, 490 (1917). An

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26. Nor would the court have had the authority to award relief to non-victims under §§1981 and 1983. No violations of those statutes have ever been established either.

employer cannot be required to afford preferential treatment solely because of an imbalance in its work force. This Court has long held that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

Section 703(j) does not preclude an award of preferential treatment as a remedy for victims of discrimination. But it does expressly preclude awarding preferential treatment absent a finding of discrimination. *See Teamsters*, 431 U.S. 324, 374 n.61 (1977). Court-ordered preferences have never been approved by this Court without the existence of a constitutional or statutory violation. *Regents of University of California v. Bakke*, 438 U.S. 265, 302 (1978). In *Bakke*, this Court reaffirmed the necessity of a finding of a constitutional violation to invoke court-ordered preferences, stating:

> Indeed, §703(j) of the Act makes it clear that preferential treatment for an individual or minority group to correct an existing "imbalance" may not be required under Title VII. 42 U.S.C. §2000e-2(j). Thus, Title VII principles support the proposition that *findings of discrimination must precede the fashioning of remedial measures* embodying racial classifications. *Id.* at 308-09, n.44 (emphasis added).

Accordingly, the court-imposed preference below runs afoul of the clear mandate of §703(j).

Although the precise language of §703(j) is persuasive evidence of the purpose of the statute, *see United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940), the legislative history of §703(j) provides firm additional support for reversal of the lower court's award of preferential treatment to non-victims. In *United Steelworkers of America v. Weber*, 443 U.S.

193 (1979), this Court noted that §703(j) was enacted to alleviate fears of "undue 'Federal Government interference with private business because of some Federal employee's ideas about racial balance or racial imbalance.'" *Id.* at 206, quoting 110 Cong. Rec. 14314 (1964) (Remarks of Sen. Miller). This Court further noted that the congressional comments "were intended as assurances that Title VII would not allow establishment of systems 'to maintain racial balance in employment.'" *Id.* quoting 110 Cong. Rec. at 11848.[27] This Court concluded that a voluntary affirmative action plan was not an impermissible preference precluded by §703(j), because the employer was not *required* to implement such a plan.[28] The reasonableness of the plan was founded upon the fact that it was a temporary tool for remedying past discrimination "without attempting to 'maintain' a previously achieved balance." *Id.* at 216 (Blackmun, J., concurring).

Here, by contrast, the court required the City to maintain a racial balance without a prior judicial finding of discrimination. The court's orders were not based upon the City's failure to abide by its obligations under the 1980 Decree; the City's compliance was both clear and unchallenged. Rather, the court's orders were issued solely

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27. Justice Rehnquist, in his opinion dissenting on other grounds, cited the comments of Representatives Celler and Minish as further indicating the purpose of §703(j). Representative Celler stated: "Even [a] court could not order that any preference be given to any particular race, religion or other group, but would be limited to ordering an end to discrimination." 443 U.S. at 233, 110 Cong. Rec. 1518. Representative Minish added: "Under title VII, employment will be on the basis of merit, not of race. This means no quota system will be set up, . . . and no one will be given a vested right to demand employment for a certain job." *Id.* at 233-34 n.13, 110 Cong Rec. 1600.

28. In his concurring opinion, Justice Blackmun found that the preferential hiring was a reasonable response by a private employer "whether or not a court, on there facts, could order the same step as a remedy." *Id.* at 211.

to prevent an expected reduction of minority employment (caused by economic conditions) which would have resulted from the operation of a concededly bona fide seniority-based layoff policy. The City voluntarily agreed to affirmative action in hiring and promotion, but it did not voluntarily agree to maintain a fixed level of minority employment. The court's mandate to retain certain employees (and to lay off certain others) solely because of their race transgresses the permissible bounds of involuntary affirmative relief.

Courts of appeals have consistently rejected court-imposed preferential treatment absent a finding of discrimination. *See Waters v. Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976); *Watkins v. United Steel Workers Local No. 2369*, 516 F.2d 41 (5th Cir. 1975); *Chance v. Board of Examiners*, 534 F.2d 993 (2d Cir. 1976), *cert. denied*, 431 U.S. 965, *reh'g denied*, 434 U.S. 881 (1977). In *Watkins* the district court, as here, required an employer to ignore seniority and lay off employees in proportion to the racial composition of the work force, notwithstanding the absence of a judicial finding of discrimination. The Fifth Circuit reversed, holding that the abrogation of seniority rights in the absence of a violation constituted an impermissible preference under §703(j), 516 F.2d at 46:

> To hold the seniority plan discriminatory as to the plaintiffs in this case requires a determination that blacks not otherwise personally discriminated against should be treated preferentially over equal whites. . . . The result which plaintiffs seek, therefore, is not that personal remedial relief available under Title VII, but rather a preferential treatment on the basis of race which Congress specifically prohibited in Section 703(j).

In *Chance v. Board of Examiners*, 534 F.2d at 998, the Second Circuit Court of Appeals also rejected the judicial imposition of a racially-based layoff policy where no discriminatory hiring practices had been proved. There, the court distinguished between proper exercise of the court's remedial power and impermissible preferential treatment:

> If a minority worker has been kept from his rightful place on the seniority list by his inability to pass a discriminatory examination, he may, in some instances, be entitled to preferential treatment—not because he is Black, but because, and *only to the extent* that, he has been discriminated against. *Id.* at 999 (emphasis added).

The Second Circuit further noted that an award is forbidden when no unlawful conduct has been proved, stating: "[T]he non-remedial distortion of a seniority system through preferential treatment based solely upon race is a form of reverse discrimination specifically proscribed by Congress." *Id.* at 998.

The express prohibition of §703(j) against judicially-imposed, non-remedial preferential treatment, as well as the legislative history and judicial interpretation of that section, require a reversal of the lower court's decision.

III. THE DECISION BELOW WILL HAVE A CHILLING EFFECT ON THE USE OF VOLUNTARY CONSENT DECREES.

Voluntary settlement of Title VII suits is a preferred means of achieving elimination of employment discrimination. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). Judicial power to modify consent decrees to include provisions which were not agreed to by the parties and which override contractual obligations will discourage

future use of consent agreements to settle discrimination lawsuits by both private and public employers.

In reaching the compromise agreement embodied in the 1980 Decree, the minority employees agreed that:

> Both plaintiffs and the class they represent shall seek no further relief for the acts, practices or omissions alleged in the complaints save to enforce the provisions of this Decree, thereby waiving the right to seek further relief (City Pet. A61).

The City fully expected, therefore, that the terms of the Decree would not be enlarged absent a showing of a new violation or a showing that the City had not complied with the Decree. The court below nevertheless imposed additional obligations upon the City, notwithstanding the uncontroverted evidence that the City had complied fully with the terms of the Decree. If judicial power exists to modify the parties' contract without an adjudicated basis for doing so, both the integrity of the agreement itself and the very reasons why the parties voluntarily accept binding consent decrees are utterly destroyed.

That very concern was aptly expressed by the Third Circuit in *Fox v. United States Department of Housing*, 680 F.2d 315 (1982). The court rejected the plaintiff's request to modify a consent decree to include an additional obligation, stating:

> As with all final judgments, the parties have a strong interest in the finality of the decision; in addition, when the plaintiffs have made a "free, calculated and deliberate choice to submit to an agreed upon decree rather than seek a more favorable litigated judgment their burden . . . is perhaps even more formidable than had they litigated and lost." *Id.* at 322 (citation omitted).

The decision below, which relieves the plaintiffs from their negotiated agreement, destroys any reasonable assurance that negotiated conditions contained in similar agreements will be enforced. Unless reversed, it will surely result in a reluctance of other municipalities and private employers to enter into consent decrees. *See United States v. ITT Continental Baking Co.*, 420 U.S. 223, 249 (1975) (Stewart, J., dissenting, joined by the Chief Justice and Justices Powell and Rehnquist). Such policy considerations dictate that the modification of the consent decree, without a finding of a breach of the terms of the Decree or a new violation warranting remedial action, ought to be reversed.

IV. THE DECISION BELOW CONSTITUTES AN IMPROPER JUDICIAL INTRUSION INTO LOCAL GOVERNMENTAL AFFAIRS.

In fashioning equitable remedies for racial discrimination, this Court has recognized the possibility that judges may overreach into local affairs and has cautioned federal courts to be mindful of the interests of state and local authorities in managing their own affairs. *Milliken v. Bradley*, 433 U.S. 267, 282 (1977). As stated by this Court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971):

> Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.

The power of the federal courts to restructure the operation of local government "may be exercised only on the basis of a constitutional violation." *Milliken v. Bradley*, 418 U.S. 717, 738 (1974), quoting *Swann*, 402 U.S. at 16. *Accord, Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419-20 (1977).

Rewriting the City's bona fide seniority system in the absence of an adjudication that the City has breached its legal duty constitutes an excessive and unwarranted judicial intrusion into the local affairs of the City of Memphis. The Sixth Circuit attempted to bring its opinion within the proper bounds of its authority by stating that the district court's orders merely prohibited the layoffs as proposed, inferring that the City was free to choose alternative solutions to its financial problems. Such disclaimer, however, is mere sophistry.

The district court's orders did not merely enjoin the layoffs. Rather, the court ordered the City to propose an alternate method for the layoffs and then, by the order entered on June 26, 1981, required layoffs of Fire Department personnel which contravened both the seniority provisions contained in the Memorandum of Understanding between the City and the Union and the City's existing layoff policy. A court's imposition of a race-conscious layoff policy on an objecting municipality and union, without a finding of racial discrimination, transgresses the permissible bounds of judicial authority as expressed in *Swann* and *Milliken I*.

Nor can it be said that the local authorities had "defaulted." The evidence below does not suggest that (since 1974) the City's hiring policies were discriminatory. Rather, the statistics cited by the Sixth Circuit reveal that between March 24, 1972 (the effective date of Title VII as to municipalities), and September 1977, four years prior to the layoffs, 26% of Fire personnel hired were black. 679 F.2d at 578-79. When compared to the 1978 census data (32.8% black civilian labor force),[29] the statistics do not reveal a default by the City. Once having implemented nondiscriminatory hiring practices, the district court is not

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29. See n.12, *supra*.

empowered to ensure a racial balance in the City's work force by requiring that a certain percentage of minority employment be maintained. *See Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 436-37 (1976). As no constitutional or statutory violation was (or could be) found by the district court based upon utilization of a neutral, bona fide seniority system, the court's intrusion into the administration of the local authority's employment policies in this case was clearly improper.

CONCLUSION

Based upon the foregoing reasons, the decision of the Court of Appeals should be reversed, with instructions to dismiss the request for injunctive relief.

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August 20, 1983

ADDENDUM A

42 U.S.C. §2000e-2(h), Section 703(h): Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

42 U.S.C. §2000e-2(j), Section 703(j): Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer, referred or

classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. §2000e-5(g), Section 706(g): If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

42 U.S..C. Section 1981: All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. Section 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

ADDENDUM B

FIRE PRIVATES

NAME	SENIORITY DATE	RACE	DISPOSITION
Maury Tennyson	2-1-81	W	Laid off
Harold Poston	1-24-81	W	Laid off
Ken O. Ellis	12-17-80	W	Laid off
Glenn Meadors	12-4-80	W	Laid off
Raymond Ray	9-20-80	W	Laid off
Ernest E. Hulbert	7-17-80	W	Laid off
Charles T. Belk	4-17-80	W	Laid off
Larry Kirby	1-18-80	W	Laid off
Leo Winfrey	11-5-79	B	Laid off
James Winfield	11-5-79	W	Laid off
Dell Ray Travis	11-5-79	W	Laid off
Terry Thaxton	11-5-79	B	Laid off
William Starrett	11-5-79	W	Laid off
John D. Payne	11-5-79	W	Laid off
James F. Morgan	11-5-79	W	Laid off
Harold L. Moore	11-5-79	B	Laid off
Timothy B. Mitchell	11-5-79	W	Laid off
*Cornelius McFadgon	11-5-79	B	Retained in position
Michael Maxwell	11-5-79	W	Laid off
Tommy Mansfield	11-5-79	W	Laid off
Billy L. Mansel	11-5-79	W	Laid off
Javier Lerma	11-5-79	W	Laid off
*Keith O. Jones	11-5-79	B	Retained in position
*Willie Johnson	11-5-79	B	Retained in position
*Amos Hester	11-5-79	B	Retained in position
*Larry Harris	11-5-79	B	Retained in position
Larry Harmon	11-5-79	W	Laid off
*Alonzo Gardner	11-5-79	B	Retained in position
Gary Dennington	11-5-79	W	Laid off
Stanley Darden	11-5-79	W	Laid off

*Denotes minority employee passed over under Court's order.

DRIVERS

NAME	SENIORITY DATE	RACE	DISPOSITION
Roger Peck	9-24-73	W	Bumped to Fire Private
Andrew Patton	9-24-73	B	Bumped to Fire Private
Brian Nance	9-24-73	W	Bumped to Fire Private
*Ronald Moore	9-24-73	B	Retained in position
Donald Kuhn	9-24-73	W	Bumped to Fire Private
*Terrold Bilfrew	9-24-73	B	Retained in position
John Watson	1-2-73	W	Bumped to Fire Private
*Bennie Shields	1-2-73	B	Retained in position
William C. Pleasants	1-2-73	W	Bumped to Fire Private
*Eddie Newsom	1-2-73	B	Retained in position
*Robert Freeman	1-2-73	B	Retained in position
Nelson Boren	1-2-73	W	Bumped to Fire Private
Thomas Seever	12-17-72	W	Bumped to Fire Private
*Elbert Rich	10-30-72	B	Retained in position
Ronald McCarty	10-30-72	W	Bumped to Fire Private
*Joseph Hodges	10-30-72	B	Retained in position
Glenn Hardin	10-30-72	W	Bumped to Fire Private
Gary Hall	10-30-72	W	Bumped to Fire Private
Robert Franks	10-30-72	W	Bumped to Fire Private
Joe Caldwell	10-30-72	W	Bumped to Fire Private
*Jerome Woods	9-5-72	B	Retained in position
*Malcolm Nelson	9-5-72	B	Retained in position
William Murphy	9-5-72	W	Bumped to Fire Private
Enoch McBride	9-5-72	W	Bumped to Fire Private
Marix Hughes	9-5-72	W	Bumped to Fire Private
*Johnny Harrison	9-5-72	B	Retained in position
Joe Wheeler	6-5-72	W	Bumped to Fire Private
Claude Terrell	6-5-72	W	Bumped to Fire Private
Stephen Raney	6-5-72	W	Bumped to Fire Private
James Mills	6-5-72	W	Bumped to Fire Private
Enoch Gentry	6-5-72	W	Bumped to Fire Private
Tony Gallo	6-5-72	W	Bumped to Fire Private
Steve Simmons	6-5-72	W	Bumped to Fire Private

*Denotes minority employee passed over under Court's order.

INSPECTORS

NAME	SENIORITY DATE	RACE	DISPOSITION
Ronald Williams	1-15-76	W	Bumped to Fire Private
Allen Roberts	9-24-73	W	Bumped to Fire Private
William Billings	9-24-73	W	Bumped to Fire Private
Grafton Logan	7-21-73	B	Bumped to Fire Private
Steve Selph	10-30-72	W	Voluntary layoff
Curtis Richmond	10-30-72	B	Bumped to Fire Private
*Raymond McGahee	6-5-72	B	Retained in position
Harold McKinney	6-28-71	W	Bumped to Fire Private
*Fred Jones	11-3-69	B	Retained in position
Gerald Alsup	11-3-69	W	Bumped to Fire Private
Bobby Dennington	8-25-69	W	Bumped to Fire Private
Stanley Arendale	5-1-69	W	Bumped to Fire Private
Phillip T. Hall	3-17-69	W	Bumped to Fire Private

*Denotes minority employee passed over under Court's order.

LIEUTENANTS

NAME	SENIORITY DATE	RACE	DISPOSITION
John Alsobrook	9-30-74	B	Bumped to Fire Private
John Malone	1-2-73	B	Bumped to Fire Private
*Percy Alexander	1-2-73	B	Retained in position
*Ricky Tate	10-30-72	B	Retained in position
*William Kegler	10-30-72	B	Retained in position
Charles Smith	6-5-72	W	Bumped to Fire Private
*Quincy McKay	6-5-72	B	Retained in position
*Raymond Lewis	6-5-72	B	Retained in position
*Dewey Harris	6-5-72	B	Retained in position
*Robert Downey	6-5-72	B	Retained in position
*Gus Bailey	6-5-72	B	Retained in position
*Chester Anderson	6-5-72	B	Retained in position
*Jesse Jones	6-28-71	B	Retained in position
*Ray Cobb	10-23-70	B	Retained in position
Herman Vaughn	11-3-69	W	Bumped to Fire Private
*Archie Scruggs	11-3-69	B	Retained in position
*Don Hulbert	11-3-69	B	Retained in position
*Nathaniel Partee	8-25-69	B	Retained in position
Jimmie Hartsfield	8-25-69	W	Bumped to Fire Private
*Herbert Redden	5-1-69	B	Retained in position
W. Patterson	5-1-69	W	Bumped to Fire Private
Jerry Burnett	5-1-69	W	Bumped to Driver
John Looney	3-17-69	W	Bumped to Driver
*Willie Flowers	3-17-69	B	Retained in position
Robert Burns	11-29-68	W	Voluntary retirement
Jerry Sides	10-1-68	W	Bumped to Driver
James Patterson	10-1-68	W	Bumped to Fire Private
Jack Pannell	10-1-68	W	Bumped to Fire Private
*Leon Bowen	10-1-68	B	Retained in position
Donald Wolfe	7-16-68	W	Bumped to Driver

*Denotes minority employee passed over under Court's order.

FIRE PREVENTION SUPERVISORS

NAME	SENIORITY DATE	RACE	DISPOSITION
James A. Bacon	6-12-74	W	Voluntary retirement
*Clarence E. Howard	5-1-69	B	Retained in position
Jack G. Bacon	3-17-69	W	Bumped to Inspector

*Denotes minority employee passed over under Court's order.

FIRE ALARM OPERATOR I

NAME	SENIORITY DATE	RACE	DISPOSITION
Denise Mathews	12-8-80	B	Voluntary resignation
David P. Currie	12-8-80	W	Laid off

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Nos. 82-206, 82-229

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FIREFIGHTERS LOCAL UNION NO. 1784,

Petitioner,

v.

CARL W. STOTTS, et al.

MEMPHIS FIRE DEPARTMENT, et al.,

Petitioners,

v.

CARL W. STOTTS, et al.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED*

1. Is this appeal moot?

2. Did the district court abuse its discretion in issuing a preliminary injunction limiting the laying off of black employees?

3. Is the consent decree, as construed by the courts below, valid?

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*The parties to this appeal are set forth in the Brief on the Merits for Petitioner Firefighters Local Union No. 1784 (hereinafter "Union Brief").

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Nos. 82-206, 82-229

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

FIREFIGHTERS LOCAL UNION NO. 1784,

Petitioner,

v.

CARL W. STOTTS, et al.

MEMPHIS FIRE DEPARTMENT, et al.,

Petitioners,

v.

CARL W. STOTTS, et al.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

On February 16, 1977, respondent Carl Stotts, a black Memphis firefighter, filed this class action alleging that

the Memphis Fire Department had engaged in racial discrimination in hiring and promotion in violation of the Fourteenth Amendment, 42 U.S.C. §§ 1981 and 1983, and Title VII of the 1964 Civil Rights Act. (J.A. 9-12). Stotts specifically claimed that he had been denied promotions solely because of his race. (J.A. 10). On June 19, 1979, respondent Fred L. Jones, also a black city firefighter, filed a complaint with similar allegations, complaining in particular that he had been denied promotion to the position of Fire Inspector solely because of his race. (J.A. 15-17). The two proceedings were consolidated in the district court.

This private litigation took place against the background of a prior consent decree entered into by the City of Memphis and the United States Department of Justice

in 1974. (J.A. 98-115). The 1974 Consent Decree, which applied to several Memphis city agencies, including the fire department, required Memphis to achieve "throughout the work force proportions of black ... employees in each job classification approximating their respective proportions in the civilian work force." (J.A. 101). In 1981, however, after the United States decree had been in effect for seven years, less than 12% of the uniformed fire department employees were black,[1/] although blacks accounted for 35% of the Memphis area work force.[2/] In addition, many of the positions beyond the entry level jobs remained all-white or virtually all-

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1/ Exhibit C, Plaintiffs' Supplemental Memorandum In Support of a Preliminary Injunction.

2/ City Petition A22.

white.[3/] On April 25, 1980, after the completion of extensive discovery, the parties to the private litigation entered into a consent decree. Paragraph 6 of that decree obligated the city "to raise the black representation in each job classification to levels approximating the black proportion of the civilian labor force." (City Petition A64). The decree contained several more specific, although not exclusive, requirements as methods of achieving this goal. With regard to hiring, paragraph 7 required the city to attempt to fill "on an annual basis at least 50% of all vacancies with qualified black applicants." (Id.) The city also agreed that

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3/ Exhibit C, Plaintiffs' Supplemental Memorandum in Support of a Preliminary Injunction. These positions included Fire Maintenance Mechanic (21 whites, 0 blacks), District Chief (35 whites, 1 black), Fire Alarm Operator III (20 whites, 1 black), Captain (84 whites, 2 blacks) and Driver (296 whites, 15 blacks).

in making promotions it would seek to assure that "at least 20%" of the firefighters promoted into each position were black, (Id. at A65); this obligation was included to ensure that the overall goal was reached "as quickly as practicable". (Id.). The decree required the city to give specified promotions to the two named plaintiffs and to several other named black employees listed in an Exhibit A.[4/] Some of these promotions were to occur immediately, while others were to occur as soon as the named individuals passed examinations for the positions involved. The decree expressly recited that its purpose was "to remedy the past hiring and promotion practices of the Memphis Fire Department", (id. at A64) and "to insure

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4/ Exhibit A is set forth in Appendix A to this brief.

that any disadvantage to minorities that may have resulted from past hiring and promotional practices be remedied...." (Id. at A60). The district court was authorized to issue "such further orders as may be necessary or appropriate to effectuate the purpose of this decree." (Id. at A69)

During the year after the entry of the consent decree a number of problems arose. Although the decree required the "immediate promotion" of eight black firefighters listed in Exhibit A, the city did not actually promote them[5/] for several months following final approval of the decree, and then only after the plaintiffs filed a Motion to Enforce the Consent Decree

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5/ The city did increase the salaries of these employees following approval of the consent decree, but refused to give them the rank, insignia, or assignments to which they were entitled.

on July 25, 1980. In addition, the city declined to hold a test for the position of District Chief, thus preventing plaintiff Stotts from obtaining the promotion guaranteed to him under Exhibit A of the decree. Since paragraph 5 of the decree required that promotional examinations be given "on a regular basis, but in any event, at least every two years" (City Petition A64), the city's continued refusal to conduct a District Chief test after December, 1980, the second anniversary of the last such test, was a clear violation of the decree. Nonetheless, by the end of the first year of the decree the city filed reports stating that, pursuant to the decree, a total of 18 new black employees had been hired,[6/] and a total of 18 black fire-

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6/ See Appendix B to this brief.

fighters had received promotions.[7]

On May 4, 1981, however, the city announced that, because of financial problems, it intended to demote and lay off a significant number of firefighters. The employees to be laid off or demoted were to be chosen under a Layoff Policy that had been formulated by the city on April 29, 1981. (J.A. 82-95). A list of Fire Department personnel, also issued on May 4 by the city, contained the names of 39 fire officers initially slated for demotion; among that group were 23 blacks, including 8 who had received their promotions under the consent decree.[8] The city ultimately proposed to demote 14 of the 18 blacks promoted under the decree, including 4 of the 8 blacks whose promotions were ex-

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7/ See Appendix C to this brief.

8/ The list was annexed as Exhibit B to Plaintiffs' Supplemental Memorandum in Support of a Preliminary Injunction.

pressly required under Exhibit A,[9] and to lay off 15 of the 18 blacks who had been hired under the decree.[10]

On May 4, 1981, plaintiffs sought and obtained a temporary restraining order forbidding the demoting or laying off of any employees in the Fire Department. (J.A. 20-23). On May 7, 1981, Firefighters Local Union No. 1784 was permitted to intervene in this action with the consent of the parties. (J.A. 3). On May 8, 1981, four days after the city announced the proposed layoffs, a hearing was held on respondents' request for a preliminary injunction (J.A. 29-81). Following that hearing the district court lifted its total prohibition against the laying off or demotion of black employees. The

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9/ See Appendix C to this brief.

10/ See Appendix B to this brief.

court held that the city could demote or lay off black employees, but only so long as it did not reduce the percentage of blacks in four specified positions -- lieutenant, driver, inspector and private. (City Petition A76, A78). The court directed the city to submit for its approval a plan for making any demotions or layoffs. (Id.) This preliminary injunction, announced from the bench on May 8, 1981, was memorialized in an order issued on May 18, 1981. The city and union filed a notice of appeal on May 18, 1981. (J.A. 5).

On June 22, 1981, plaintiffs filed a Motion for Additional Relief, seeking to extend the rule contained in the May 18 preliminary injunction to five other positions in which demotions or layoffs were then scheduled -- Fire Alarm Operator

I, Home Fire Safety Representative, Fire Prevention Supervisor, Clerk Typist, and Research and Development Lieutenant. (J.A. 123). Plaintiffs also noted that the city had not filed its proposed plan for compliance with the May 18 order, and requested that it be required to do so. A hearing on this motion was held on June 23, 1981. Although the city did not submit a written plan to the court, the city Personnel Director testified at that hearing that the city proposed to comply with the May 18 order by exempting from demotion or layoff a sufficient number of blacks to avoid reducing the percentage of blacks in the four positions covered by that order. (J.A. 134-35). In an order dated June 25, 1981, the district court approved that plan, but did not issue any order requiring the city to

implement it. (City Petition A83). The court refused to extend its May 18 order to the positions of Home Fire Safety Representative or Research and Development Lieutenant, applying it only to the additional classifications of Fire Alarm Operator I, Clerk Typist and Fire Prevention Supervisor. (Id.) Neither the city, the union, nor the plaintiffs appealed from the June 25 order.

The actual impact of the May 18 preliminary injunction on the layoffs in the Fire Department was extremely limited. The city ultimately decided to lay off only 24 privates. To comply with the May 18 order it was necessary that no more than 3 of those laid off be black; under the city's own Layoff Policy, 6 of the 24 privates who would have been laid off were

black.[11/] Thus only three additional whites were actually laid off as a result of the May 18 order. Those three white employees,[12/] who were laid off on June 26 and 27, 1981, were reinstated on July 19, July 20, and July 23, 1981,[13/] respectively, each having been out of work less than four weeks.

The plaintiffs never sought a final injunction with regard to the 1981 layoffs or demotions. The July, 1981, recalls made any further injunctive relief regarding layoffs entirely unnecessary. Once the total number of privates on layoff

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11/ See Appendix D to this brief. The operation of that policy is described in detail at pp. 82-84, infra.

12/ Stanley Darden, Gary Dennington, and Larry Harmon.

13/ These are the recall dates listed in the personnel files of the three white employees.

fell below 22, the application of the city's April 29 Layoff Policy itself assured that the proportion of black privates would not be lower than the pre-layoff level.[14/] Neither the city nor the union ever asked for a trial to finally resolve whether plaintiffs were entitled to injunctive relief, or sought to lift the preliminary injunction on the ground that the plaintiffs had failed to do so. This is hardly surprising, for after July 23, 1981, the May 18 preliminary injunction no longer had any operative effect on layoffs of Fire Department employees.

Both the city and the union, however, vigorously pursued their appeal from the May 18 preliminary injunction. On May 7, 1982, the court of appeals affirmed the

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14/ Only 3 of the 21 least "senior" privates were black. See Appendix D.

decision of the district court granting the preliminary injunction. The court of appeals found that the issuance of that preliminary relief was not an abuse of discretion. (City Petition A31.). More specifically, the Sixth Circuit held that there was a reasonable probability the plaintiffs would prevail on the merits, that the proposed layoffs would cause irreparable injury, and that the granting of preliminary relief was in the public interest. (Id.) The city and union petitioned for writs of certiorari to review the court of appeals decision upholding the May 18 order insofar as it granted a preliminary injunction regarding layoffs.[15/]

15/ The Questions Presented in both the union and city petitions are expressly limited to "layoffs." Although both petitions note that the decisions below also concerned demotions (City Petition 3, 5; Union Petition 4, 5), the arguments contained in the petitions in support of granting the writs refer to layoffs

SUMMARY OF ARGUMENT

I This is an appeal from a preliminary injunction granted on May 18, 1981. The clear intent of that injunction was only to partially preserve the status quo threatened by then imminent layoffs, not to establish any permanent rule governing layoffs. The preliminary injunction merely preserves 1981 black employment levels, and is thus literally inapplicable to layoffs in 1983 or later in positions in which black representation now exceeds 1981 levels.

Only three whites were actually laid off as a result of the May 18 order --

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15/ continued

(City Petition 8, 15; Union Petition 8, 9). While the issue before this Court may thus be limited to layoffs, we note where appropriate the facts relevant to the proposed and actual demotions.

Stanley Darden, Gary Dennington, and Larry Harmon. All three were recalled within a month, and have been back at their jobs throughout this appeal. Every person laid off or demoted from a position affected by the May 18 order has now been reinstated. That order thus has no present effect, and the underlying controversy is moot.

Petitioners earlier advised the Court that the May 18 order had a continuing impact on white workers, but that representation was inaccurate. The order did not preclude whites from taking promotional examinations, since no such tests were given while the layoffs were in effect. Neither did the preliminary injunction postpone the automatic promotion to captain given to certain firefighters with over 30 years service; that automatic promotion applies only to firefighters hired prior to 1977, and all the firefighters who were

laid off had been hired in 1979 or later.

This is not a dispute "capable of repetition, yet evading review." That exception to the usual mootness rules applies only where there is a "demonstrated probability" the dispute will recur. Murphy v. Hunt, 455 U.S. 478, 482 (1982). Memphis has laid off firefighters only once in its 162 year history, and is unlikely to do so again while the consent decree remains in effect. Layoffs are not by their nature so short-lived that controversies about them can never be reviewed on appeal. Compare Garnett Co. v. DePasquale, 443 U.S. 368, 377 (1979)(pre-trial hearing), Roe v. Wade, 410 U.S. 113, 125 (1973)(pregnancy). Layoffs in both private industry and the public sector often go on for years; many of the "layoffs" in the steel industry, for example, are apparently permanent.

II. Since the order appealed from is only a preliminary injunction the question before this Court is whether the district court abused its discretion in entering an order to protect the status quo. Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975). The standard for granting such preliminary relief is whether the plaintiff is likely to prevail on the merits, and whether the plaintiff would suffer irreparable injury were that relief denied.

The proposed layoffs would have violated the consent decree in several ways. (1) Between April 1980 and May 1981 the defendants, to comply with the decree, hired 18 new black firefighters and promoted 18 others; the city proposed in the spring of 1981 to dismiss 15 of the new hires and to rescind 14 of the promotions. Exhibit A of the decree specifically required the promotion of 9 named indi-

viduals, including plaintiff Fred Jones; the city proposed to rescind 6 of those promotions. (2) Paragraph 6 of the decree required the city to "raise" minority representation in each position to levels comparable to the civilian labor force. Paragraph 8 contemplates that this goal is to be achieved "as quickly as possible." The proposed layoffs and demotions would have reduced minority representation, and delayed the attainment of the mandated employment levels. (3) The expressed purpose of the decree is to remedy "any disadvantage that may have resulted from past hiring and promotional practices." (City Petition A60-A61). Based on the necessarily limited record available at the preliminary injunction hearing, the district court was justified in concluding that the proposed layoffs would "perpetuate discrimination". (J.A. 30-31).

In considering the likelihood that plaintiffs would prevail on the merits, the district court properly restricted its inquiry to the language and purpose of the consent decree. United States v. ITT Continental Baking Co., 420 U.S. 223 (1975). The district judge's construction of that decree is entitled to particular deference since he was the same judge who had earlier approved the decree and monitored its implementation.

The preliminary injunction did not require the city to utilize a race-conscious layoff plan. That order left the city free to adopt any plan for reducing personnel, or otherwise cutting costs, which would have avoided any disparate impact on minorities. The Firefighters Union offered a number of racially neutral plans. Neither plaintiffs nor the district court expressed any preference regarding how

compliance was to be achieved. The choice of a race-conscious layoff plan was made by the city itself, which cannot now be heard to complain about its own selection. The union may still disagree with that choice, but it never appealed from the district court order of June 25, 1981, approving the plan.

III. Petitioners contend that the consent decree, as construed by the courts below, volates Title VII. Their contentions, if sustained, would virtually prohibit the use of consent decrees in Title VII actions.

Petitiones urge, first, that under section 703(h) of Title VII, no consent decree can provide any relief adversely affecting the seniority rights of whites, until and unless there has been a judicial determination that every minority beneficiary of the decree was an actual victim of

discrimination. They also contend that section 706(g) requires such an adjudication before a court can order into effect a consent decree containing injunctive relief requiring hiring or promotion adversely affecting the interests of whites.

This construction of Title VII has no support in the language of the statute, in its legislative history or in the cases decided thereunder. Moreover, such a construction would, if sustained, require an employer to take to trial legal or factual claims to which it knew there was no defense. Complaints seeking hiring, promotions, or constructive seniority could never be settled on terms favorable to plaintiffs. Such an extraordinary limitation on the voluntary resolution of Title VII litigation is inconsistent with Congress' expressed preference for conciliation and settlement. Ford Motor Co. v.

EEOC, ___ U.S. ___, 73 L.Ed.2d 721 (1982).

Petitioners and the United States assert that, as a result of the May 18 order, junior black employees were retained while whites "with more years of service" were laid off. (U.S. Brief, p. 21). This is not true. The three whites laid off as a result of that order were hired on the same date as the three blacks who remained at work. Under the City's Layoff Policy these whites were to have kept their jobs, rather than the blacks, solely because employees with equal terms of service and comparable personnel records were ranked alphabetically. Whatever protection section 703(h) may afford to seniority systems, it conveys no comparable special status on alphabetization.

ARGUMENT

I. THIS APPEAL IS MOOT

The May 18 order from which the city

and union have appealed is not a permanent injunction regulating all future layoffs, but a preliminary injunction clearly intended to control only the particular layoffs that were impending in the spring of 1981. The order is expressly headed "Order Granting Preliminary Injunction." (City Petition A77). It applies only to the four particular positions -- lieutenant, driver, inspector and private -- in which demotions or layoffs were then planned. (Id. at A78). The minimum percentage of blacks which the city was to retain was that of blacks "presently employed" in those positions, (Id. at A76, A78)(emphasis added), a standard which would make no sense if applied to future layoffs when minority employment levels would doubtless be higher than in 1981. Since the proportion of privates, lieutenants and drivers is higher today than in 1981, the May 18, 1981, order would be

literally inapplicable to layoffs or demotions occurring in 1983 in those positions.[16/] The district judge's reasoning was expressly based on the particular circumstances that existed in 1981, "the effect of these layoffs and reductions in rank" (Id. at A78) and the fact that in that year only 11 percent of the Fire Department employees were black. (Id. at A75).

All of the 1981 layoffs and demotions which were the subject of the May 18 preliminary injunction have since ended.

16/ The proportion of blacks in each position were as follows:

Position	Percent Black January 1981	Percent Black September 1983
Private	13.6%	16.2%
Driver	4.8%	5.2%
Lieutenant	12.1%	14.0%

(City Petition, A11; Fire Department Employee List, September 7, 1983.)

By the spring of 1983 every Fire Department employee who had been laid off or demoted in 1981 had been offered back his old position. The preliminary injunction ceased to have any operative significance long before certiorari was granted, since most of those who were laid off or demoted following the issuance of that injunction would have been subject to the same action even if no injunction had ever been granted. In the case of the layoffs subject to the May 18 preliminary injunction, 21 of the 24 individuals actually laid off would have also been laid off under the city's own April 29 Layoff Policy. Only three whites were actually laid off as a result of the May 18, 1981, order, and the last of them returned to work on July 23, 1981.

Whether the May 18 preliminary injunction is upheld or reversed on appeal is a

matter devoid of any practical consequence. No white is now out of work, or in a lesser position, because of that order, and no black is any longer retained in his or her job because of it. If the May 18 preliminary injunction is upheld by this Court, no black employee will receive any benefit; if that order is reversed, no white will profit thereby. Because the May 18 order is literally inapplicable to any future controversy, whether or not it is sustained on appeal will not directly effect any layoffs or demotions that might occur subsequent to the decision of this Court.

Petitioners, however, have represented to this Court that the May 18 order has a continuing impact on white employees. Petitioners' Joint Opposition to Respondents' Suggestion of Mootness, pp. 5-7. First, petitioners assert:

> [T]hose firefighters entitled under municipal charter to promotion to captain after 30 years' service (City of Memphis Charter, §67) will be delayed in the realization of this entitlement as a result of their layoff. 17/

This is not correct. Section 67 was amended in 1976 to confer automatic promotions only on firefighters hired before September 15, 1976.[18/] All the employees laid off in 1981 were hired in 1979 or later. Second, petitioners assert:

> While reduced in rank ... more senior white firefighters lost their opportunity to take examinations for the purpose of securing promotions to the next higher rank. 19/

This is not correct. Promotional examinations were given on June 15-19, 1981, prior

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17/ Petitioners' Joint Opposition to Respondents' Suggestion of Mootness, p. 5.

18/ The amendment was proposed by Ordinance No. 2488, and approved by a referendum of city voters on November 2, 1976.

19/ Petitioners' Joint Opposition to Respondents' Suggestion of Mootness, p. 6 n.1.

to the disputed layoffs. The three whites laid off as a result of the May 18 order left their jobs no earlier than June 26, 1981, and returned no later than July 23, 1981; no examinations were given during this 28 day period, or at any time prior to the reinstatement of all the employees on temporary layoff or demotion. Third, petitioners assert:

> During the period white firefighters were laid off, black firefighters with equal or less seniority continued to accumulate seniority while their white counterparts did not. One effect of the layoffs has been to render these white firefighters less senior for purposes of future job decisions and entitlements. 20/

The May 18 order does not forbid the city to give employees seniority credit while they are on layoff; black and white employees accrued no such seniority while

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20/ Id. at 5.

they were laid off solely as a result of section 6(B) of the city's own Layoff Policy.[21/] If the May 18 order is upheld on appeal, the City of Memphis, which adopted that policy unilaterally in April 1981, could nonetheless, with a stroke of the pen, unilaterally alter that policy to provide the seniority credit in question. Conversely, even if the May 18 order is reversed, employees who were laid off in 1981 still would receive no seniority credit for that period unless the city itself chooses to alter its Layoff Policy. Either way, it is the City of Memphis, not any decision of this Court, which will determine whether such seniority credit is

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21/ The Layoff Policy was adopted unilaterally by the city in April 1981. Section 6(B) of that Policy reads:

> B. Employees shall not receive seniority credit during their layoff period. (J.A. 95).

given to white or black employees. In addition, the effect of the May 18 order on the seniority of the three whites affected was so small that it is exceedingly unlikely it will ever affect their future employment status even if the city refuses to readjust their seniority.[22/]

Petitioners also suggest that, even if the controversy concerning the May 18 order is itself moot, the layoff dispute which gave rise to it is one "'capable of repetition, yet evading review' Southern Pacific

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22/ Darden, Dennington and Harmon each lost less than one month of seniority. No "less senior" blacks were retained during their layoff; the three blacks protected by the May 18 order, Jones, Johnson and McFadgon, had the same seniority date as the whites who were laid off in their place. The seniority loss at issue would affect Darden, Dennington and Harmon only in the unlikely event that in making some future layoff, promotion or transfer decision the city were choosing between one of them and Jones or Johnson. McFadgon is no longer employed by the Fire Department.

Terminal Co. v. I.C.C., 219 U.S. 498, 515 (1911)."[23/] But the exception to the usual mootness rule announced in Southern Pacific Terminal and its progeny is not applicable to the instant case.

Petitioners assert that the controversy which led to the May 18 order is "capable of repetition" because "there is no guarantee that ... in the future" there will be no layoffs, and because whether such layoffs will in fact occur is "entirely speculative."[24/] But

> [t]he Court has never held that a mere physical or theoretical possibility was sufficient to meet the test.... If this were true, virtually any matter of short duration would be reviewable. Rather, we have said that there must be a "reasonable expectation" or a "demonstrated probability" that the same controversy will recur involving the same complaining party.

24/ Id. at 3.

Murphy v. Hunt, 455 U.S. 478, 482 (1982).[25/] There is in this case no "demonstrated probability" that a layoff controversy similar to that of 1981 will again occur during the limited period during which the consent decree will remain in effect. The 1981 layoffs that precipitated the May 18 order were the first in the 162 year history of the City of Memphis. At that rate the next layoff will occur in 2143, and will effect only the great-great-

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25/ See also Lane v. Williams, 455 U.S. 624, 633-34 (1982) (no "reasonable expectation" that defendant would again enter into an uninformed plea bargain); Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (no "demonstrated probability" former inmate would again be incarcerated and seek parole); Sosna v. Iowa, 419 U.S. 393, 399-400 (1975) (Court will not "speculate" that now divorced petitioner meeting state residence requirement would subsequently marry, move from and return to state, and then seek divorce).

great-great-grandchildren of the present employees. Petitioners decline to "guarantee" that there will be no further layoffs while the decree remains in effect, but they also do not suggest that the city's actual financial condition makes such layoffs at all likely. In fact, that financial situation has improved so much since the issuance of the May 18, 1981 order that in 1983 the city found it possible both to hire 63 new firefighters[26] and to reduce the city property tax rate.[27] Even if layoffs were to occur tomorrow, whether they would reduce the proportion or even the number of blacks in any given position would depend on the number and type of layoffs. Had the city

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26/ Fire Department Employee List, September 7, 1983.

27/ Memphis Commercial Appeal, May 25, 1983, p. A1.

in 1981 laid off 8 privates rather than 24, for example, every firefighter affected would have been white,[28/] and no injunctive relief would have been necessary. The mere possibility that layoffs similar to those in 1981 might occur at some point in the distant future when the decree may still be in effect falls far short of the "reasonable expectation" of recurrence required by the decisions of this Court. See United States v. New York Telephone Co., 434 U.S. 159, 165 n.6 (1977) (controversy regarding pen registers not moot in light of "the Government's determination to continue to use them"); SEC v. Sloan, 436 U.S. 103, 109 n.5 (1978) (controversy regarding SEC procedures not moot in case of "chronic violator" subject to a series of Commission orders); Carroll v President

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28/ See Appendix D to this brief.

and Commissioners of Princess Anne, 393 U.S. 175, 178 (1968) (controversy regarding injunctions against rallies not moot in case of political activists who "sought to continue their ... rallies").

Should a layoff controversy indeed arise while the consent decree remains in effect, the legal and factual issues presented would doubtless be different than in 1981. The identity and proportion of blacks and whites affected by any future layoff will certainly be different than in 1981; whether a substantial number of the particular blacks then facing demotion or layoff will have been hired or promoted under the consent decree itself cannot be foreseen. Plaintiffs may attempt to prove at such a future hearing, as we did not in this case, that the new layoffs, or the existing or some subsequent Layoff Policy, were motivated by racial considera-

tions or by a desire to evade the requirements of the consent decree. Plaintiffs may seek injunctive relief that is broader or narrower in scope than that obtained in this case. The low proportion of blacks in the fire department work force, a significant factor in the 1981 decision, will, one hopes, have been improved upon. In short, should the district court again be asked to issue a preliminary injunction with regard to layoffs, the legal issues whose probable outcome will have to be assessed, and the equitable considerations and claims asserted by each party, will necessarily differ from the record upon which the district court based its decision in 1981. A future request for a permanent injunction would of course be subject to an entirely different legal standard than that applicable to a motion for a preliminary injunc-

tion. University of Texas v. Camenisch, 451 U.S. 390, 394-98 (1981).

Although the May 18 order regarding layoffs was moot within a month after it was implemented, that does not mean that other decisions regarding layoffs will necessarily or even probably "evade review." This Court has held that requirement satisfied only by disputes which by their very nature were certain to last only a few weeks or months, such as controversies concerning the closing of a court during a pretrial hearing,[29/] pretrial detention,[30/] durational residence require-

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29/ Gannett Co. v. DePasquale, 443 U.S. 368, 377 (1979); Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 546-47 (1976) ("[t]hese are by nature short-lived").

30/ Gerstein v Pugh, 420 U.S. 103, 110 n 1 (1975) ("Pretrial detention is by nature temporary,...."); Dunn v Blumstein, 405 U.S. 330, 333 n.2 (1972).

ments,[31] pregnancy,[32] rules governing the nomination of candidates for public office,[33] or orders expressly effective for only a fixed and short period of time.[34] Petitioners assert that layoffs are by their very nature so brief that they "could be expected" to end "during the normal time required for the resolution of the controversy."[35] This contention, if true, would come as welcome news to the hundreds of thousands of men and women who

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31/ Sosna v. Iowa, 419 U.S. 393, 400-01 (1975); see also Rosario v. Rockefeller, 410 U.S. 752, 756 n.5 (1973).

32/ Roe v. Wade, 410 U.S. 113, 125 (1973).

33/ Moore v. Ogilvie, 394 U.S. 814, 816 (1969).

34/ SEC v Sloan, 436 U.S. 103, 107-110 (1978) (10 day suspension orders); Carroll v President and Commissioners of Princess Anne, 393 U.S. 175, 177 (1968) (10 day injunction).

35/ Petitioners' Joint Opposition to Respondents' Suggestion of Mootness, p. 6.

formerly worked in the steel automobile chemical and other industries, who were laid off years ago and who have no realistic expectation of ever being recalled Municipal layoffs can be as enduring as those in private industry, police officers laid off by New York City in 1975 were not all recalled until 1982 and Detroit police officers laid off in the last recession still have not all be recalled. In fact, layoffs vary enormously in duration; in some instances, as here, employees return to work in a matter of weeks, but in other cases "layoff" is little more than a euphemism for permanent dismissal.

The questions raised and briefed at length by petitioners are not limited to the specific consent decree involved in this case, or to the particular legal status or treatment of layoffs as such, but are for the most part equally applicable to

the validity, construction and "modification" of any consent decree and to all consent decree provisions regarding promotions and other terms and conditions of employment. The arguments advanced by petitioners regarding the special position of seniority systems under Title VII of the 1964 Civil Rights Act concern the effects of a consent decree or judicial order on any aspect of such a system. We note that the amicus brief filed by the United States in this action is substantially the same as amicus briefs it has filed in other actions in which layoffs are not at issue.[36/] Whatever questions of ongoing importance the petitioners, the amici and the Court may believe were raised by the May 18 order

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36/ Williams v. City of New Orleans, No. 82-3435 (5th Cir.); Bratton v. City of Detroit, No. 80-1837 (6th Cir.).

will not be forever denied appellate review merely because they are not resolved in this moot litigation.

Long forgotten in petitioners' resolute quest for some landmark decision by this Court are Stanley Darden, Gary Dennington, and Larry Harmon -- the only whites actually laid off as a result of the May 18 order. Throughout the period during which this dispute has raged, first in the Sixth Circuit and then in this Court, Darden, Dennington and Harmon have been back at their jobs at the Memphis Fire Department. Their supposed champions, the City of Memphis and the Firefighters Local Union No. 1784, could with a stroke of their pens have restored the month of seniority and the modest income[37/] which

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37/ The monthly income of Darden, Dennington and Harmon in 1981 was $1267.63. Each of them was laid off for less than a month.

Darden, Dennington and Harmon lost while on layoff. Instead, the city and union have expended subsantial time and effort, and paid counsel fees many times greater than the wages at issue, in a quixotic appeal which can win no possible relief for the individuals on whose behalf it has ostensibly been pursued.[38/] Whether or not the district court abused its discretion in granting the May 18 preliminary injunction, may be a question about which the city and union may wish an advisory opinion, or about which historians of a later generation may debate, but that order today imposes no restrictions on the defendants in this action and confers no benefits on the plaintiffs. The issues briefed by the defendants and amici concerning the meaning

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38/ Petitioners do not contend, for example, that Darden, Dennington and Harmon would be entitled to an award of back pay if the May 18 order were overturned.

of Title VII are of no greater importance to the black and white employees of the Memphis Fire Department than to the millions of other workers whose rights and expectations may be affected by any construction of that statute. However litigious the counsel in this dispute may be, the resolution of these issues must await the existence of a case whose outcome will in fact have a direct and substantial effect on the interests of the parties themselves.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ISSUING A PRELIMINARY INJUNCTION LIMITING THE LAYING OFF OF BLACK EMPLOYEES

Petitioners in this case seek review not of a permanent injunction finally adjudicating their rights, but of a preliminary injunction. "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties

until a trial on the merits can be held ", University of Texas v Camenisch, 451 U.S. 390, 395 (1981). The proceedings here "bear the marks of the haste characteristic of a request for a preliminary injunction." Id at 398. The hearing on that request was held a mere four days after the layoffs were announced. With the exception of a single deposition held the day before the hearing,[39/] no discovery was taken, the trial judge noted that counsel for the parties had not had "the usual time to develop the issues, and take discovery, and exchange information, and to call on each other to state what they think the issues are ...." (J.A. 30). The union intervenors submitted no written brief in the district court, and the brief submitted by

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39/ Respondents also attempted without success to take the deposition of the city personnel director, Joseph D. Sabatini.

the city understandably contained little of the elaborate argument now offered in this Court. Neither the parties nor the district court at that early stage in this controversy could forsee how many individuals of which race would actually be demoted or laid off for what period of time; the mayor testified, for example, both that "in all likelihood" all those demoted or laid off would be restored to their jobs "within six months" (J.A. 39), and that more layoffs were "a definite possibility." (J.A. 36).

On the limited record usually available in connection with a request for a preliminary injunction, the responsibility of the district court is not to attempt to make a final determination of the merits of the controversy, but to decide whether the party seeking that relief has demonstrated "that in the absence of its issu-

ance he will suffer irreparable injury and also that he is likely to prevail on the merits." Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975). The district court may also weigh the interests of the opposing party, id., and of the public. University of Texas v. Camenisch, 451 U.S. 390, 392 (1981). "[T]he standard of appellate review is simply whether the issuance of the injunction, in the light of the applicable standard, constituted an abuse of discretion." Doran v. Salem Inn, Inc., 422 U.S. at 932; Brown v. Chote, 411 U.S. 452, 457 (1973); United States v. Corrick, 298 U.S. 435, 437-38 (1936); National Fire Insurance Co. v. Thompson, 281 U.S. 331, 338 (1930); Alabama v. United States, 279 U.S. 229, 230-31 (1929); United Fuel Gas Co. v. Public Service Commission, 278 U.S. 322, 326 (1929).

The court of appeals, in affirming the issuance of the May 18 order, noted the prerequisites established by this Court for the awarding of such relief (City Petition A30), and concluded that the district judge "did not abuse his discretion in granting the preliminary injunction." (Id. A31). In this Court, however, neither the city nor the union assert in so many words that the granting of that injunctive relief was an abuse of discretion, or that plaintiffs failed to adduce evidence of irreparable injury or probable success on the merits. Rather, petitioners treat this appeal as if it were taken from a permanent injunction, press for a final decision on the merits of the controversy, and ask the Court to "dismiss the request for injunctive relief." (City Brief, p. 38)

Although the briefs of petitioners do not directly address the relevant standard of review, we treat them as asserting that the granting of a preliminary injunction was an abuse of discretion, either because there was no likelihood that plaintiff could prevail on the merits, or because of the scope of the injunctive relief granted.

Both petitioners and the United States discuss at length the legislative history of various provisions of Title VII of the 1964 Civil Rights Act. Had the May 18 order been preceded by and based on a trial and resolution of the merits of plaintiffs claims of racial discrimination, the meaning of Title VII would be of undoubted importance in ascertaining the appropriate scope of injunctive relief. But the merits of those claims had been resolved by the 1980 consent decree. Once that decree was

approved, any claims for additional relief were to be judged by reference to the terms of the settlement itself. "[S]ince consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts, without reference to the legislation the [plaintiff] originally sought to enforce." United States v. ITT Continental Baking Co., 420 U.S. 223, 236-37 (1975). The "scope of a consent decree must be discerned within its four corners," United States v. Armour & Co., 402 U.S. 673, 682 (1971), not by reference to the claims or defenses which might have been asserted had the action gone to trial. "Few persons are in a better position to understand the meaning of a consent decree than the district judge who oversaw and approved it." Brown v. Neeb, 644 F.2d 551, 558 n.12 (6th Cir. 1981).

In the district court proceedings plaintiffs did not base their request for a preliminary injunction on an attempt to prove that the layoffs would violate Title VII, but argued, as the city notes, "that the proposed layoffs would violate the terms of the 1980 Decree." (City Petition, p.5.)[40/] The district court indicated it believed itself obligated to act if the proposed layoffs would have the very effect on the Fire Department work force "which the Consent Decree undertook to avoid." (J.A. 30). The court of

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40/ Plaintiffs' Verified Application for Temporary Restraining Order asserted the layoffs and demotions would "effectively destroy the affirmative relief granted by this Court in the Consent Decree entered on April 25, 1980." (J.A. 21) Plaintiffs' Supplemental Memorandum in Support of a Preliminary Injunction contended the layoffs and demotions were "designed to thwart gains made by blacks in the last two years" and would "violate[] the spirit of the 1980 Decree." (Pp. 2-3).

appeals, in sustaining the preliminary injunction, also relied on the consent decree:

> The 1980 Decree imposes a duty on the City to engage in certain affirmative action in its hiring and promotion decisions.... The City contracted in the ... 1980 Decree[] to accomplish precisely that which the layoffs would destroy: a substantial increase in the number of minorities in supervisory positions.... [T]he City's announcement ... was in effect notice of the City's intended anticipatory repudiation of the ... 1980 Decree[]. The announcement notified Plaintiffs that (1) relief previously granted pursuant to the Decree[] would be diminished; and (2) prospective relief under the Decree[] would not be forthcoming. (City Petition A32-A33).

The court of appeals recognized that the plaintiffs and district court "merely sought to compel compliance with the terms and goals of the Decree[]." (Id. at A33).

The record in this case provides a substantial basis for the conclusion that plaintiffs would ultimately have prevailed in their challenge to the layoffs and demotions as originally proposed. First, many of the blacks slated for layoff or demotion had been hired or promoted by the city within the previous year in order to comply with the terms of the 1980 consent decree. Of the 18 blacks whom it had hired under the decree since April, 1980, the city sought to layoff 15.[41/] Of the 18 blacks whom it had promoted under the decree since April, 1980, the city sought to demote 14.[42/] Paragraph 9 and Exhibit A of the consent decree expressly required the city to give immediate promotions to nine specific black employees,

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41/ See Appendix B to this brief.

42/ See Appendix C to this brief.

including Fred Jones, one of the named plaintiffs. Despite the fact that the promotions required by paragraph 9 and Exhibit A were not conditioned upon the city's financial position, the city proposed to demote Jones and five other Exhibit A promotees. Had the city announced in May, 1980, that it was refusing for financial reasons to make the promotions required by paragraph 9 and Exhibit A, the violation of the consent decree would have been obvious. The city's proposal in May, 1981, to rescind those very promotions in May was hardly a less palpable violation. The city's obligation to promote and hire the other blacks involved was equally unconditional.

Second, paragraph 6 of the consent decree obligated the city to take "reasonable good faith efforts" "to raise the black representation in each job classifi-

cation on the fire department to levels approximating the black proportion of the civilian labor force...." (City Petition A64)(Emphasis added).[43/] This obligation is equally unconditional; no circumstances are mentioned under which the city may take steps to actually lower black representation. The decree does make some allowance for unforeseen problems in providing that efforts to "increase" minority representation need only be "reasonable;" thus paragraph 6 might plausibly be read not to require the city to hire or promote new blacks into positions from which it was at the same time actually laying off or demoting whites. But that qualification falls far short of authorizing the city to reduce black representation. The United

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43/ The city recognizes that paragraph 6 is not merely precatory, but creates an enforceable obligation. City Petition, p. 4.

States dismisses paragraph 6 by insisting that any reduction in the black work force is merely a "delay in achieving the order's goal." (U.S. Brief, p. 21 n.18). But the manifest purpose of the decree is to achieve that goal with all reasonable dispatch. Paragraph 8 requires the city to attempt to fill 20% of all promotions with blacks "[t]o insure as quickly as possible the attainment of [the] long range goal." (City Petition A65)(Emphasis added). The 50% hiring goal in paragraph 7 obviously has the same purpose. The United States may be in no hurry to see an increase in minority employment in the Memphis Fire Department, but under the consent decree time is clearly of the essence.

Third, the consent decree recites that its purpose is to ensure "that any disadvantage that may have resulted from past

hiring and promotional practices be remedied...." (City Petition A60-A61)[44/] The city and union correctly recognize that if a black had less seniority because of past discrimination, a layoff or demotion based on that reduced seniority would perpetuate and aggravate a "disadvantage that ... resulted from past hiring and promotional practices." Such disadvantages would also be perpetuated if, because of the discriminatory denial of a promotion, a black were excluded from a position in which no layoffs or demotions occurred; there were, for example, no demotions or layoffs in 1981 from the position of captain, but then as now virtually all the captains were white. The city and union

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44/ See also id. at A64, ("The purpose of this decree is to remedy the past hiring and promotion practices of the Memphis Fire Department with respect to the employment of blacks....").

assert that, although the layoffs and demotions may well perpetuate the effects of past racial discrimination, the district court had no authority to prevent that perpetuation because Title VII does not authorize redress for disadvantages caused by the operation of a seniority system.[45/] But it is by the words of the consent decree, not of Title VII, that the district court's actions must be measured, and the decree states without any limitation an intent to correct "any disadvantage" rooted in past discrimination. (Emphasis added). The layoff or dismissal of a black employee because of lesser seniority or occupancy of a lesser position due to past discrimination would clearly thwart that stated purpose, and the district court correctly concluded that

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45/ Union Brief, p. 21; City Brief, p. 27.

under the consent decree the city could not "lay people off in a manner that will perpetuate discrimination against black people." (J.A. 30-31)

The United States, however, in an argument embraced by neither the city or the union, asserts on no fewer than six occasions that the blacks who benefitted from the May 18 order were not victims of any unlawful employment discrimination, (U.S. Brief, pp. 9, 11, 12 n. 13, 20, 21, 29), claiming that this is "conceded[]." Id. at 20. But the record in this case contains nothing to substantiate that assertion, and the pleadings do not reveal any such concession. As a practical matter, neither party was in a position at the hearing of May 8, 1981, held only four days after the announcement of the proposed layoffs, to adduce evidence regarding which of the blacks affected were the victims of

past discrimination, or even to ascertain with certainty who those black employees would be.[46/] Counsel for the city actually objected at that hearing to the introduction of any evidence regarding discrimination that had occurred prior to the consent decree. (J A 58-59). The district judge, based on his familiarity with the extensive discovery that had occurred prior to the settlement of the case in 1980, concluded:

> [I]t would be naive not to realize that the Fire Department of this City was very discriminatory towards black people for years, and it really wasn't corrected properly until the Consent Decree was entered in this cause. 47/

46/ Of the three blacks who avoided layoff because of the May 18 order, two -- Johnson and McFadgon -- had been rejected for employment by the Fire Department in 1977.

47/ City Petition A73.

Regardless of whether, had a trial on the merits been held, the consent decree would have been construed to require the plaintiffs,[48/] or to permit the defendants, to adduce evidence regarding whether particular blacks were the victims of discrimination, the granting of preliminary relief in light of the unavoidably limited information available at the May 8, 1981 hearing, was clearly not an abuse of discretion.

The city and union repeatedly object that the decision of the district court imposed on the city new obligations to which it had never agreed. But their characterization of the requirements of the May 18 order as "new" is merely a con-

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48/ Clearly no such proof was relevant to paragraphs 6 and 9 of the decree. See pp. 54-57, supra.

clusory method of reasserting their disagreement with the decision below that the proposed layoffs and demotions would have violated the 1980 consent decree. The fact that layoffs and demotions are not expressly mentioned in the decree did not mean that the city was free to violate or frustrate the provisions of the decree so long as it did so by means of layoffs or demotions. Under paragraph 17 of the decree, moreover, the district court is not limited to forbidding violations of the particularized requirements imposed by the decree, but can also issue "such further orders as may be necessary or appropriate to effectuate the purposes of this decree." (City Petition A69)(Emphasis added).

The court of appeals, in addition to sustaining the preliminary injunction as based on a plausible construction of the

decree, also held in the alternative that the district court had the authority to "modify" the consent decree to limit layoffs and demotions of black employees. (City Petition 2A, 12A, 31A-37A). This case does not involve a "modification" of the consent decree in the sense in which that term is used in United States v. Swift & Co., 286 U.S. 106 (1932). In Swift the defendants asked the Court to release them from provisions of a consent decree expressly forbidding them to operate retail meat markets or engage in other specified activity. This Court held that the express requirements of such a decree would not be lifted in the absence of "a clear showing of grievous wrong evoked by new and unforeseen conditions...." 286 U.S. at 119. Similarly, in Hughes v. United States, 342 U.S. 353 (1952), this Court declined to modify a consent decree to alter a provi-

sion expressly authorizing the defendant to own certain stock. 342 U.S. at 357-58. But the consent decree contains no such express reference to or authorization of layoffs or demotions on any particular basis; it is literally silent on the subject. There is in the decree no layoff provision to "modify."

The use and meaning of the term "modify" by the courts below derives from the opinion of Judge Bailey Brown in Brown v. Neeb, 644 F.2d 551 (6th Cir. 1981). In Brown v. Neeb, as here, the district judge had limited the layoffs of black employees, relying on a consent decree that dealt solely with hiring and promotions. Judge Brown concluded,

> [E]ven if layoffs by seniority were not proscribed by the consent decree as originally entered, the district court had the authority to, in effect modify the consent decree to

> proscribe layoffs by seniority. This is true since the district court ... determined that such was necessary, due to changed circumstances, to carry out the expressed purpose and goal of the consent decree.

644 F.2d at 565. The consent decree in Brown v. Neeb contained a section, similar to paragraph 17 in the instant case,[49/] empowering the court to enter "such further orders as may be appropriate to effectuate the provisions of the Order...." 644 F.2d at 555. Regardless of whether judicial action under such provisions is characterized as a "modification" of the more specific provisions, it remains action authorized by and within the four corners of the decree itself.

Even in the absence of paragraph 17, the order of the district court is sustain-

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49/ See p. 64, supra.

able as an exercise of the inherent authority of federal courts to enter orders necessary to ensure that a change in circumstances does not frustrate the remedial provisions of a consent decree. In exercising that authority the standard to be applied is "whether the change [would] serve[] to effectuate or to thwart the basic purpose of the original consent decree." Chrysler Corporation v. United States, 316 U.S. 556, 562 (1942); see also United States v. United Shoe Machinery Corp., 391 U.S. 244, 248-49 (1968). "If a plaintiff can show that modification of the decree is crucial to the effectuation of the purpose the decree was intended to achieve, then a grievous wrong would be perpetrated if the decree was not modified." Gautreaux v. Pierce, 535 F. Supp. 423, 426 n.7 (N.D. Ill. 1982). Regardless of whether the steps which the city pro-

posed to take were technically a violation of the consent decree, the authority recognized in Chrysler Corporation v. United States and United States v. United Shoe Machinery Corp. was properly exercised to prevent actions which would have "virtually destroyed" the relief which plaintiffs had negotiated and obtained in and under the consent decree. (City Petition A32).

Petitioners contend that affirmance of the Sixth Circuit decision will discourage settlement of Title VII actions by prompting fears on the part of employers that consent decrees will be construed to impose new and unbargained for obligations. (City Brief, pp. 34-36; Union Brief, p. 25). But it could be argued with equal force that the reversal of that decision would deter settlements by raising fears on the part of Title VII plaintiffs that consent

decrees will be rendered nugatory by changing circumstances or subsequent interpretation. In reality, whenever an individual or organization enters into a written agreement, be it a consent decree, a contract, or a lease, there is always a danger that the document will be interpreted more broadly or narrowly than may be desired. Better drafting, not rules of construction guaranteeing success in litigation to one party or the other, is the traditional and appropriate method of minimizing such risks. Regardless of the outcome of the instant litigation, its primary impact on Title VII settlements will be to prompt the attorneys negotiating future consent decrees to spell out with precision how any layoffs and demotions are to occur, rather than agreeing to decrees which, as here, are concededly "silent" on

those issues. (City Brief, p. i, Union Brief, p. i).

The parties also appear to attack the particular form of injunctive relief awarded by the district court. The union accuses the court of having "abrogated" the seniority system. (Union Brief, p. i). The city charges that the trial judge with "requiring layoffs to be based upon racial considerations." (City Brief, p. i). The United States claims "the decree required the City to layoff employees in accordance with racial quotas." (U.S. Brief, p. 24).

The actual language of the May 18 order does not require any race-conscious standard be used for selecting the employees to be laid off. That injunction only limited the use of the seniority system

> insofar as it will decrease the percentage of black lieutenants,

> drivers, inspectors and privates that are presently employed....

(City Petition, A78)(Emphasis added). This order, even if extended to all positions in the Fire Department, still permitted the routine application of the seniority system in a wide variety of circumstances. First, as we have seen, whether seniority based layoffs would reduce the percentage of black employees depended on the total number of layoffs. If, for example, the city had chosen to lay off 21 privates rather than 24, there would have been no disparate impact.[50/] Thus, even though the May 18 order was subsequently applied to clerk typists, it had no effect there since "the original seniority system did not operate so as to reduce the percentage of minority employees." (City Brief, p. 8

50/ See Appendix D to this brief.

n.13). In addition, many positions remained all-white;[51/] layoffs there would have had no racial impact whatever. The May 18 order did not forbid the complete elimination of a position, since that would result in the laying off of all employees holding it, and the city subsequently proceeded to reduce employment in just that manner. (See City Petition A82-A83). Since the positions, and number of individuals in each, to be subject to layoff was not governed by the Layoff Policy, out remained in the discretion of the mayor (J.A. 83), a more sensitive consideration of where the layoffs were to be made would have satisfied the May 18 order without the slightest violation of the seniority system.

51/ In January, 1981, there were a total of 92 whites in all white positions. Exhibit C, Plaintiffs Supplemental Memorandum in Support of a Preliminary Injunction.

While this case was still pending in the district court, the union itself urged the adoption of a number of racially neutral plans entirely consistent with the May 18 order. The Firefighters Union attempted to persuade the city to avoid the necessity for layoffs by giving employees the option of taking voluntary unpaid leaves of absence in order to preserve the jobs of their colleagues.[52/] The American Federation of State County and Municipal Employees suggested that each employee be permitted or required to take off one day per month without pay.[53/] In its Answer, the Firefighters urged that the court enjoin all layoffs in the Fire Department (J A. 25), forcing the city to make the

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52/ Memphis Commercial Appeal, June 25, 1981, p. 17.

53/ Id.

needed cuts in agencies which provided less essential services and which were not subject to the requirements of the consent decree. The mayor noted that the need for layoffs might be avoided simply by reducing the number of hours worked by some or all employees. (J.A. 38). The court observed that the city might achieve a similar result by providing incentives for early retirement. (J.A. 74). In this Court, the Amicus American Jewish Congress suggests a number of other racially neutral alternatives[54/] that might have been utilized.

But while there were thus a variety of racially-neutral methods available for complying with the May 18 order, the district court left the choice of method up

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54/ Brief of the American Jewish Congress, Amicus Curiae, in Support of Respondents, pp. 28-39.

to the city. Plaintiffs took no position in the district court regarding how compliance should be achieved. It was the city, not plaintiffs or the trial judge, which selected the race-conscious plan that the city personnel director first described to the court on June 22, 1981. (J.A. 132). The district judge did not, as the city asserts, subsequently "require[] layoffs which contravened ... the seniority provisions" (City Brief, p. 37)(Emphasis added) or "impos[e] ... a race conscious layoff policy on an objecting municipality" (id.)(emphasis added); the court's June 25 order merely "approved" the method selected by the city itself. (City Petition A83).

The union, of course, is not responsible for the race-conscious plan chosen by the city. Here, as in the district court, the union objects to the city's choice. The trial judge, noting the

union's objections to the procedures for implementing that policy, observed "I didn't call for the layoff, but I'm certainly not going to be a vehicle to get in this dispute between the Union and the City...." (J.A. 138). The union, however, chose not to appeal from the June 25 order, and thus is not entitled to ask this Court to resolve its disagreement with the city about that plan.

The injunctive relief granted by the district court was, in comparison with the consent decree violations involved, quite limited. The temporary restraining order approved on May 4, 1980, had forbidden the city to lay off or demote <u>any</u> black employees; had the preliminary injunction contained a similar provision, it would have had the effect of raising the proportion of blacks in several positions, thus carrying out paragraph 5 of the consent

decree. Under the preliminary injunction actually entered, the city was permitted to lay off 18 black employees and to demote 5 others.[55/] The district court might have forbidden the city to lay off any employee hired as a result of the consent decree; had it so ruled the city would have been able to lay off only 6 black employees, rather than 18.[56/] The limited relief actually afforded by the preliminary injunction relief clearly did not constitute an abuse of discretion.

III. THE CONSENT DECREE, AS CONSTRUED BY THE COURTS BELOW, IS VALID

Assuming, arguendo, that the courts below correctly interpreted the consent

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55/ See Appendices B and C to this brief, and Addendum A to the City Brief.

56/ See n. 55, supra. The court of appeals regarded district courts decision as reducing the city's obligations under the consent decree. City Petition A34.

decree, the union and city contend that the consent decree as so construed is invalid. The union asserts that the relief imposed by the district court "exceeds even that relief to which the City and respondents might permissibly have consented." (Union Brief, p. 22 n. 17). The city urges that the decree as construed below "conflicts with congressional purpose as clearly expressed in [Title VII] and as clearly expounded by this Court in prior cases." (City Brief, p. 26). The contentions of the city and union are of considerable importance since they would, if sustained, preclude the resolution through conciliation and settlement of a substantial portion of all Title VII cases.

The arguments of petitioners and of the United States are grounded on section 703(h) of Title VII, which immunizes certain seniority systems from challenge

under Title VII, and section 706(g) of Title VII which describes the remedial authority of a district court to enforce Title VII. All three acknowledge, as they must, that there are circumstances which, if found by a court after a trial on the merits, would require issuance of an order similar to that of May 18; such relief would be appropriate, for example, if a court held that the affected blacks were the victims of prior discrimination, or that the seniority system was not bona fide. They contend, however, that Title VII forbids a defendant from agreeing in a consent decree to the very relief for which it would be liable if plaintiffs prevailed at trial. Thus the United States urges "it is clear that the City could not unilaterally contract away the incumbent employees' seniority rights ..." (U.S. Brief p. 22 n. 20). The city repeatedly argues that

seniority relief can only be provided to "persons who have ... been adjudged victims of past discrimination." (City Brief, p. 29; see also id. at 26, 31, 33)(Emphasis added).

Whatever the merits of these contentions, their relevance to this case depends upon the assumption that the May 18 order required that more senior whites be laid off while less senior blacks remained at work. The United States contends, "As a result of the district court's decree, white firefighters with more years of service than black employees were furloughed ..." (U.S. Brief, p. 21). The city advises the Court that "non-minority employees with greater seniority than skipped-over minority employees were laid off ...." (City Brief. p. 9). The union represents that "[a]s a result of [this] order[], the City was required to lay off

... more senior incumbent nonminority employees..." (Union Brief, p. 26).

The facts of this case are otherwise. As is apparent from Addendum B to the City's brief,[57/] the three whites laid off as a result of the May 18 order, Harmon, Dennington and Darden, were all hired on November 5, 1979, the same day as the three blacks, Jones, Johnson, and McFadgon, who, as a result of that order, were "retained in position".[58/] Far from having "more years of service", as the

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57/ See also Appendix D to this brief.

58/ The city declares that since 1974 blacks have been hired in numbers "far exceeding the minority percentage within the civilian labor force." City Brief, p. 29, n.25. In fact, the city did no hiring between 1974 and 1977. While it hired between 1977 and 1980, blacks were appointed in proportions that were somewhat lower than the rate at which blacks applied for employment.

United States asserts, those three whites had not served so much as a day longer than their three black co-workers. Since all six employees had identical seniority, the city's Layoff Policy could not, and did not, select those to be laid off on the basis of seniority. Rather, under paragraph 3(c) of the Layoff Policy (J.A. 85), when several employees have the same seniority, the choice of the employees to be laid off is to be made by city supervisory officials after reviewing the personnel records of the employees concerned. Where employees are deemed to have identical records, they are to be ranked alphabetically.[59/]

59/ The Layoff Policy provides that the ranking of employees with identical records and seniority is to be based on any method provided by an applicable Memorandum of Understanding with a union. (J.A. 85-86). The Memorandum of Understanding with the Firefighters calls for alphabetization. (J.A. 117).

In the instant case the city apparently concluded that the records of all employees hired on November 5, 1979, were indistinguishable, and therefore ordered those employees alphabetically. (See City Brief, Addendum B). Thus, under the Layoff Policy, McFadgon, Johnson and Jones were to have been laid off because "J" and "M" are after "D" and "H" in the alphabet, and because their employment records were only as good as, but not better than, those of Harmon, Dennington and Darden. The principle the city proposed to apply was not "last hired, first fired",[60/] but "simultaneously hired, reverse-alphabetically fired." Such a scheme is no more a "seniority system" than pulling names at random out of a hat. Whatever importance

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60/ See City Petition, p. 5; Union Brief, pp. 11, 40.

Congress may have attached to rights acquired by greater length of service, Title VII evinces no intention to attach any talismanic significance to the sort of arbitrary method utilized under the Layoff Policy.

Even if the May 18 preliminary injunction had affected seniority rights rather than alphabetical rights,[61/] that order, and the consent decree being so enforced, would not have transgressed the provisions of Title VII. First, section 703(h) of Title VII does not insulate a seniority system from alteration in the fashioning of a remedy. Rather, that section helps to

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61/ The preliminary injunction did result in demotions of more senior whites in place of less senior blacks. City Brief, A5-A8. The seniority system in the Memorandum of Understanding, however, applies only to layoffs. (J.A. 116-119). See also n.15, supra.

define what is and is not a violation of the Act, see e.g., Teamsters v. United States, 431 U.S. 324 (1977), but it in no way limits the remedial authority of the federal courts. Franks v. Bowman Transportation Co., 424 U.S. 747, 758 (1976). In the instant case it is the language of the consent decree, not the terms of Title VII, which determines the relief to which respondents are entitled to relief.

Second, Petitioners do not deny that a plaintiff could, consistent with Title VII, win at trial relief similar to or even broader than that contained in the May 18 order. They urge, however, that a defendant may not agree to, and a court should not approve, a settlement containing precisely the same relief. On this view an employer, however certain it might be of losing at trial, could not acquiesce in a

settlement which had any adverse impact on the seniority rights or expectations of white employees. The effect of such a rule would not be limited to consent decree provisions regarding layoffs; most remedial action traditionally contained in consent decrees would be also forbidden. Where seniority is a factor in promotions, for example, a consent decree establishing goals for future minority promotions would be invalid. Not a single black employee could receive a promotion in such a case unless and until a federal judge, after a hearing on the merits, first concluded that the employee was an "actual victim" of discrimination.

A Title VII case alleging discrimination in hiring, and seeking constructive seniority for the alleged victims of that unlawful practice, simply could not be settled on terms favorable to the plain-

tiffs. Disputes about whether a seniority system was bona fide, or about the identities of the blacks denied seniority because of discrimination, could never be resolved short of trial. The United States candidly acknowledges that this interpretation of Title VII would, in the view of the Equal Employment Opportunity Commission, "call into question numerous extant consent decrees and conciliation agreements to which the EEOC is a party."[62/] (U.S. Brief p. 24 n. 23).

62/ This observation applies with equal force to the many judgments and consent decrees to which the United States is a party because the United States' position in this case is a recent departure from the consistent position it has taken in prior years. For example, in a brief filed in the Third Circuit on December 13, 1976 in EEOC v. American Telephone and Telegraph Co., 556 F.2d 167 (3d Cir. 1977), cert. denied, 438 U.S. 915 (1978) the United States and the E.E.O.C. argued that

> The district courts remedial authority under Section 706(g) ... to order race ... conscious goals to correct

62/ continued
the effects of past discrimination is not limited by Sections 703(a), (j) or (h).

Respondents have reproduced the Government's persuasive argument to the Third Circuit at Appendix E of this brief.

It should also be noted that the present position of the United States is in direct contravention of existing regulations and guidelines of several Federal Agencies, including those of the Department of Justice. See, e.g., Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, As Amended, 29 C.F.R. § 1608 (1982) (specifically endorsing the use of goals and timetables in affirmative actions plans "regardless of whether the persons benefited were themselves the victims of ... past discrimination,") 29 C.F.R. § 1608.4(c). The regulations promulgated by the EEOC are particularly persuasve for Congress has directed that the EEOC coordinate efforts by all federal agencies to enforce equal employment opportunity laws and policies. See 42 U.S.C. § 2000e-14, as amended by Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978). See also Executive Order No. 12067, requiring the EEOC to "provide leadership and coordination to the efforts of Federal departments ... to enforce all Federal statutes ... which require equal employment opportunity ..." 43 Fed. Reg. 28967 (July 5, 1978). See also Brief for petitioners the United States and the Equal Employment Opportunity Commission, United Steelworkers of America v. Weber, No. 76-432, at 26-35, reprinted 42 Op.

The United States and petitioners appear to go even further, and urge that a consent decree is invalid if it provides any relief to a black who is not a proven victim of discrimination. (City Brief, pp. 23-30; Union Brief pp. 30-37, United States Brief, pp. 23-29). They rely on section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), which provides in part:

> No Order of the court shall require ... the hiring ... or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was ... refused employment or advancement ... for any reason other than discrimination.

Petitioners contend that this provision is fully applicable to a consent decree, and prohibits a court from ordering into

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62/ continued

Att'y Gen. No. 37 (Sept. 22, 1969); Uniform Guidelines on Employee Selection Procedures, Appendix (Policy Statement on Affirmative Action), 29 C.F.R. § 1607.17 (1982).

effect a consent decree which contains any of the relief specified in section 706(g) unless every minority beneficiary has been adjudged by the court to be the victim of discrimination. This contention, if sustained, would virtually abolish consent decrees in Title VII cases.[63/] Despite Ford

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63/ The limitation on the settlement of civil litigation now advocated by the city, the union and the United States has no precedent in federal law. It would compel employers to defend practices and decisions they knew to be unlawful, and then to pay the prevailing plaintiffs an attorneys fee for work done at trials whose outcome was never in doubt. Requiring the trial of a substantial number of employment discrimination cases in which the plaintiffs and defendants are in complete agreement regarding the legal and factual issues involved might be justified if the language and legislative history of Title VII demonstrated implacable congressional opposition to settlement by consent decree. But that history and language reveal, on the contrary, that Congress expressed a particular preference for such voluntary resolution of Title VII litigation. Ford Motor Co. v. EEOC, 73 L.Ed.2d 721, 730 (1982); Carson v. American Brands, Inc., 450 U.S. 79, 88 n. 14 (1981); Occidental Life Insurance Co. v. EEOC, 432 U.S. 355,

Motor Co. v. EEOC, 73 L.Ed.2d 721 (1982), no court could approve, prior to trial, a consent decree ordering the hiring or promotion of a single individual. Equally impermissible would be consent decree awards of back pay, since section 706(g) applies to monetary as well as injunctive relief. Measured by the standard now advanced by the city, the consent decree in this case, even under the narrow construction urged by the city itself, would be invalid, since it required the promotion of

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63/ continued

368 (1977). Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). Any restriction on the scope of relief which may be encompassed by a consent decree would be inconsistent with the principle announced in Ford Motor Co. v. EEOC that "the legal rules fashioned to implement Title VII should be designed ... to encourage Title VII defendants promptly to make curative, unconditional job offers to Title VII claimants" 73 L.Ed.2d at 730.

13 named individuals, directed the payment of back pay to a larger group, and compelled the city to meet a goal of 50% minority hiring and 20% minority promotions, all without a judicial determination that any of the beneficiaries were actual victims of discrimination. This view, embraced by the United States as well, would invalidate the consent decree entered into in 1974 between the United States and the city, since that decree also established a 50% minority hiring goal. See also n.62, supra.

The extent to which petitioners' contentions would, if sustained, interfere with the routine settlement of Title VII litigation is illustrated by the complete inconsistency between the arguments now advanced by the city in attacking the May 18 order and the arguments the city made two years ago in defending the very consent

decree involved in this case. Following the announcement of the city's intention to enter into that decree, a group of white firefighters, including D. L. Orders, sought to intervene in this litigation and attempted to seek modification of that decree. In appealing from the denial of intervention, Orders made virtually the same argument now advanced by the city, objecting in particular to the 20% minority promotion goal. Orders contended:

> The Defendants did not adequately represent Appellants' interests when they agreed to promotion goals which have an adverse impact upon non-minority employees, the court not having found any past and continuing discrimination in promotions to warrant such equitable relief. Title VII does not allow preferential promotion to individuals not shown to be victims of past discrimination. ... Therefore, the district court erred in granting class-based relief to persons who are not identifiable victims of specific discrimina-

> tion.... To deprive non-minority employees of the expectations of advancement by promotional goals for minority employees absent a finding of continuing discrimination in promotions is an improper violation of ... their statutory rights under Title VII. 64/

The city responded:

> The facts reveal ... continuing past discriminatory practices [which] clearly support the use of the promotional goals provided for by the Decree.... [T]he entry of the Decree is a determination by the Court of Plaintiffs' ... probability of success on the merits.... [T]he Consent Decree providing for promotional goals is not improper as the Decree is a determination that Plaintiffs ... claims of past racial discrimination were supported by the facts... 65/

64/ Brief on Behalf of Proposed Intervenors-Appellants, Stotts v. Memphis Fire Department, No. 80-1489 (6th Cir.) p. 20. Orders advanced the same argument in this Court. See Petition for Writ of Certiorari, Orders v. Stotts, No. 82-204, October Term, 1982, pp. 28-29.

65/ Brief on Behalf of Defendants-Appellees' Stotts v. City of Memphis, No. 80-1469 (6th Cir.), pp. 13-14.

This brief was filed on March 5, 1981. Sixty-four days later the city submitted its first memorandum in opposition to the requested preliminary injunction at issue here, insisting "the Defendants have specifically denied any prior discriminatory conduct" and that "there is no judicial finding of discrimination by the Defendants...." 66/

In any event, nothing in section 706(g), its legislative history or the cases decided under Title VII support the position petitioners, the United States and the AFL-CIO now advocate. EEOC v. American Telephone & Telegraph Co., 556 F.2d 167, 177 (3d Cir. 1977), cert. denied, 438 U.S. 915 (1978). In view of the extensive treatment of this issue given by a number

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66/ Defendants' Brief in Opposition to Plaintiffs' Application for Preliminary Injunction, p. 9.

of amici in support of respondents,[67/] we will not re-canvass the legislative history or the cases in this brief.

By its terms, section 706(g) applies only to judicial orders. It is not intended to limit voluntary agreements between Title VII plaintiffs and defendants, since it applies only to judicial orders and it does not limit conciliation agreements negotiated by the EEOC. It is inconceivable that Congress intended to prohibit the courts from approving the same settlements which were clearly permissible prior to the commencement of litigation, and which could be entered into without

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67/ See, e.g., Brief of the Lawyers Committee for Civil Rights Under Law as Amicus Curiae and Brief of the Mexican American Legal Defense Fund as Amicus Curiae.

judicial approval if litigants so desired. See United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

Petitioners' position was implicitly rejected by this Court in Carson v. American Brands, Inc., 450 U.S. 79 (1981). In that case the district court, applying an approach similar to that advanced by the city and union here, refused to approve a Title VII consent decree containing remedial relief provisions because they "did not rest solidly on evidence of discrimination and ... were not expressly limited to actual victims of discrimination". 450 U.S. at 87 n. 12; see 446 F. Supp. 780, 788-790 (E.D. Va. 1977). In holding that the district court's action constituted an appealable order, the Court commented:

> Courts judge the fairness of a proposed compromise by weighing the

> plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement.... They do not decide the merits of the case or resolve unsettled legal questions.

450 U.S. at 88 n. 14. If, as petitioners contend, consent decree relief affecting seniority rights can only be afforded to proven victims of discrimination, a court asked to pass on such a decree would be compelled to ascertain whether plaintiffs were certain of success and to "decide the merits of the case" of every minority employee to whom that relief was to be provided.

Petitioners' assertion that Title VII never authorizes injunctive relief benefitting non-victims is unfounded. Although proven victims of past discrimination are frequently the primary direct beneficiaries of judicially ordered relief, there are circumstances in which limiting relief

to that group would clearly frustrate the purposes to Title VII. An employer intent upon excluding blacks may choose to resort to methods of discrimination which make it impossible to determine who the victims of that violation were. Where an employer engages in racially selective word-of-mouth recruiting, for example, there is usually no way to determine which blacks would have applied and been hired had that not occurred. A similar result can be achieved simply by refusing to keep records of the names of unsuccessful applicants. If a court's inability to identify the victims of discrimination automatically precluded remedial relief in such cases, racist employers would have a foolproof method for excluding minorities from some or all positions.

In addition, in a number of situations the actual victims of discrimination will

predictably have no interest in injunctive relief which is not awarded until long after the violation at issue. Casual laborers denied jobs by a construction company may still want those positions a year after that violation, but college teachers denied employment at one school are likely to accept positions at other institutions possibly hundreds or thousands of miles away, and be understandably unwilling to endure the professional and personal upheaval involved in returning to the school which first rejected them.[68/] In such a case, on petitioners' theory, the employer would be guilty of a clear violation of the law, the white beneficiaries of that illegal conduct would be known, and yet the federal courts would be powerless

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68/ Cf. Ford Motor Co. v. EEOC, 73 L.Ed.2d 721, 737 n.27 (1982).

to order remedial injunctive relief.

The purposes of Title VII, moreover, extend beyond providing protection for minority employees and job applicants. As the United States reminded this Court several years ago:

> Congress ... recognized when it extended Title VII to state and local governments ... [that] the effects of employment discrimination in this setting extend well beyond the loss of employment opportunities by particular individuals. Such discrimination deprives [a public] agency of the perspective of minority groups regarding the impact of its programs on minorities; it fosters distrust on the part of minorities of governmental functions carried out by personnel who are not representative of the community at large ... and it sets a highly visible example of discrimination, or acquiesence, in the results of past discrimination. 69/

69/ Brief of the United States and Equal Employment Opportunity Commission, Minnick v. Department of Corrections, No. 79-1213, p. 20.

Where past unlawful discrimination has brought about the exclusion of minorities from positions in such a public agency, Title VII requires that minorities be placed in those positions with all reasonable dispatch, regardless of whether the particular employees so excluded can be located. See n.62, supra and Appendix E. Vindication of the Fourteenth Amendment's prohibition against intentional discrimination, a prohibition not limited by any provision comparable to section 703(h) or section 706(g), certainly requires no less.

The Amicus AFL-CIO, in an argument not advanced by the Firefighters Union itself, asserts that the consent decree would be invalid to the extent that it overrides provisions of the Memorandum of Understanding between the city and the union. (AFL-CIO Brief, p. 2, n.1). The AFL-CIO acknowledges, however, that its view would

be irrelevant if that Memorandum did not create "legally enforceable seniority rights." (Id.) The reason why the Firefighters have refused to advance this argument is not obscure. In 1978, Firefighters Local Union 1784, the petitioner in this case, was sued for damages allegedly caused by an unlawful firefighters strike; the plaintiff grounded his cause of action in part on a claim that the strike violated the Memorandum of Understanding. The union insisted, in its defense, that that Memorandum was unenforceable:

> As it made clear in the case of Weakley Co. Municipal Electric System v. Vick, 309 S.W.2d 792 (Tenn. Ct. App. West. Sect. 1957), a labor contract or collective bargaining agreement between a municipality and a labor union is not enforceable in Tennessee. While a municipality and a union can enter into a memorandum of understanding or agreement regarding wages, hours and working conditions of employees, such an agreement is not enforceable in the courts. Thus, even if the document in question was a contract, plainitff

> has sued on an unenforceable contract.... 70/

This brief was filed by the same attorneys who now represent the union in this Court. The Tennessee courts have upheld the union's contention that its Memorandum of Understanding is unenforceable. Fulenwider v. Firefighters Association Local Union 1784, 649 S.W.2d 268 (Tenn. Sup. Ct., 1982).

CONCLUSION

The writs of certiorari should be dismissed on the ground that the controversy regarding the preliminary injunction

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70/ Supplemental Memorandum In Support Of Local Union Defendant's Motion to Dismiss, Fulenwider v. Firefighters Association Local Union 1784, No. 84348 T.D., Tenn. Circuit Ct., 15th Circuit, p. 1.

is now moot. Should the Court conclude that this issue is not moot, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

EXHIBIT A to The 1980 Consent Decree

Immediate Promotions:

A. Fire Inspector
Curtis Richmond
William Carter
John Cooper
Raymond McGahee
Fred Jones

B. Deputy Fire Marshall
Norvell Wallace

C. Driver
Willie Taylor

D. Fire Prevention Super. in Inspection
Clarence Howard

E. Metro Arson Squad Inspector
Grafton Logan

Conditional Promotions:

A. Emergency Unit Lieutenant
Robert Young may have the next opening.

B. District Chief
Carl W. Stotts when he passes the District Chief's Test.

C. Firefighting Captain
Ben Lewis when he passes the Captain's Test.

D. Maintenance Mechanic
Fred Walton may have the next opening when available upon receipt of diesel mechanic certification.

APPENDIX B

Blacks Hired Pursuant to Consent Decree

Name	Position	Status
1 Mary Hopkins	Clerk Typist	
2. Laura Brown	Home Fire Safety Rep.	Laid Off
3. Olenda Clifton	Home Fire Safety Rep.	Laid Off
4 Carlene Franklin	Home Fire Safety Rep.	Laid Off
5. Tina Hunt	Home Fire Safety Rep.	Laid Off
6. Rida Ivery	Home Fire Safety Rep.	Laid Off
7. Doris Jackson	Home Fire Safety Rep.	Laid Off
8 Rufus Jefferson	Home Fire Safety Rep.	Laid Off
9. Carolyn Powell	Home Fire Safety Rep.	Laid Off
10. Willie Pruitt	Home Fire Safety Rep.	Laid Off
11. Rose Strong	Home Fire Safety Rep.	Laid Off
12. Frase Walker	Home Fire Safety Rep.	Laid Off
13. Rickie Stokes	Personnel Technician	Laid Off
14. Denite Matshews	Fire Alarm Operator	
15. Teresa Taylor	Fire Alarm Operator	
16. Sharlene Warren	Fire Alarm Operator	
17. Raymond Gales	Repairer	Laid Off
18. Gregory Hart	Auto Parts	Laid Off

APPENDIX C

Blacks Promoted Pursuant to Consent Decree

Name	Position Promoted To	Status
1. Norvel Wallace *	Fire Deputy Marshall	
2. Willie Taylor	Driver	
3. Johnny Harrison	Driver	Protected by injunction
4. Chester Anderson	Lieutenant	Protected by injunction
5. Ray Cobb	Lieutenant	Protected by injunction
6. Don Hulbert	Lieutenant	Protected by injunction
7. William Kegler	Lieutenant	Protected by injunction
8. Percy Alexander	Lieutenant	Protected by injunction
9. Quincey McKay	Lieutenant	Protected by injunction
10. Roscoe Tate	Lieutenant	Protected by injunction
11. John Alsobrook	Lieutenant	Demoted
12. William Carter *	Fire Inspector	
13. John Cooper *	Fire Inspector	
14. Fred Jones *	Fire Inspector	Protected by injunction
15. Grafton Logan *	Fire Inspector	Demoted
16. Raymond McGahee *	Fire Inspector	Protected by injunction
17. Curtis Richmond *	Fire Inspector	Demoted
18. Clarence Howard *	Fire Prevention Supervisor	Protected by injunction

* Promotion expressly required by Exhibit A of the Consent Decree.

APPENDIX D

Least Senior Privates, June 1981 -- Employees With Same Hire Date in Reverse Alphabetical Order

Name	Seniority Date	Race
1. Maury Tennyson	2-1-81	W
2. Harold Poston	1-24-81	W
3. Ken O. Ellis	12-17-80	W
4. Glenn Meadors	12-4-80	W
5. Raymond Ray	9-20-80	W
6. Ernest E. Hulbert	7-17-80	W
7. Charles T. Belk	4-17-80	W
8. Larry Kirby	1-18-80	W
9. Leo Winfrey	11-5-79	B
10. James Winfield	11-5-79	W
11. Dell Ray Travis	11-5-79	W
12. Terry Thaxton	11-5-79	B
13. William Starrett	11-5-79	W
14. John D. Payne	11-5-79	W
15. James F. Morgan	11-5-79	W
16. Harold L. Moore	11-5-79	B
17. Timothy B. Mitchell	11-5-79	W
18. Cornelius McFadgon	11-5-79	B
19. Michael Maxwell	11-5-79	W
20. Tommy Mansfield	11-5-79	W
21. Billy L. Mansel	11-5-79	W
22. Javier Lerma	11-5-79	W
23. Keith Jones	11-5-79	B
24. Willie Johnson	11-5-79	B
25. Amos Hester	11-5-79	B
26. Larry Harris	11-5-79	B
27. Larry Harmon	11-5-79	W
28. Alonzo Gardner	11-5-79	B
29. Gary Dennington	11-5-79	W
30. Stanley Darden	11-5-79	W
31. Roy Currie	11-5-79	B
32. Frederick Cotton	11-5-79	B

APPENDIX D2

33.	Norris Chism	11-5-79	B
34.	Franklin Cathley	11-5-79	W
35.	Thomas Burk	11-5-79	W
36.	William Bryant	11-5-79	W
37.	John Brown	11-5-79	B
38.	Ronald Braden	11-5-79	B
39.	Michael Bonds	11-5-79	B
40.	Daryl Anderson	11-5-79	W

APPENDIX E

A verbatim reproduction of pages 18-31 of Brief for the Plaintiffs-Appellees (EEOC and United States) sub mitted to the United States Court of Appeals for the Third Circuit in Nos. 76-2217, 76-2281 and 76-2285, Equal Employment Opportunity Commission v. American Telephone and Telegraph Co.

A. The district court's remedial authority under Section 706(g) and Executive Order 11246 to order race and sex conscious goals to correct the effects of past discrimination is not limited by Sections 703(a), (j) or (h).

The Congress has given the district courts broad remedial authority to "order such affirmative relief as may be appropriate ... or any other equitable relief as the court deems appropriate." Section 706(g).[14/]

14/ Section 706(g), 42 U.S.C. § 2000e-5(g) (Supp. II, 1972), is set out in an appendix to this brief.

In cases of racial discrimination, the "courts has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Louisiana v. United States, 380 U.S. 145, 154 (1965). That principle is fully applicable to employment discrimination cases, and has twice been reaffirmed by the Supreme Court in construing the district court's authority and duty to order relief under Section 706(g). Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1976); Franks v. Bowman Transportation Co., 424 U.S 747 770 (1976). As the Court noted in Franks:

> The provisions of [Section 706(g)] are intended to give the courts wide discretion exercising that equitable power to fashion the most complete relief possible.' [424 U.S at 764, quoting from legislative history to

the 1972 amendments to Title VII, 118 Cong. Rec. 7168 (1972) 15/]

Each of the nine appellate courts which have confronted the issue has held that race conscious relief, including numerical goals, is appropriate, and may be necessary, under Section 706(g) and/or the Executive Order to correct the effects of racially discriminatory employment practices. E.g., United States v. International Union of Elevator Constructors, Local Union No. 5, 538 F.2d 1012 (3d Cir. 1976); Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971); Boston Chapter NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974),

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15/ Reprinted in Legislative History of the Equal Employment Opportunity Act of 1972, Senate Committee on Labor and Public Welfare, Subcommittee on Labor, at 1848 (1972).

cert. denied, 421 U.S. 910 (1975); Associated General Contractors of Massachusetts v. Altshuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974); Rios v. Enterprise Association Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976); Morrow v. Crisler, 491 F.2d 1053 (5th Cir.) (en banc), cert. denied, 419 U.S. 895 (1974); NAACP and United States v. Allen, 493 F.2d 614 (5th Cir. 1974); United States v. Local 212 International Brotherhood of Electrical Workers, 472 F.2d 634 (6th Cir. 1973); United States v. Masonry Contractors Association of Memphis, 497 F.2d 871 (6th Cir. 1974); Southern Illinois Builders Association v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); Crockett v. Green, 534 F.2d 715 (7th Cir. 1976); United States v. N.L. Industries, 479 F.2d 354 (8th Cir. 1973); United States

v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 980 (1971). The broad relief provided in such cases is designed to rectify discrimination against a class, and is not limited to identified victims of past discrimination.

The broad remedial authority of the courts under Section 706(g) and the Executive Order -- and specifically the authority to impose numerical relief -- was brought before the Congress in the course of the consideration of the 1972 amendments to Title VII. Senator Ervin introduced an amendment which would have prohibited federal agencies and officials from requiring "discrimination in reverse" by employing "either fixed or variable numbers, proportions, percentages, quotas or goals." 118 Cong. Rec. 1663 (1972) (Leg. History, supra, at 1042, 1044). His amendment was addressed to Title VII and Executive Order

11246, and was designed to limit the authority of the EEOC and the Secretary of Labor. Ibid. His amendment was opposed by Senator Williams, the floor manager, and by the minority floor manager, Senator Javits, who relied upon and had printed in the Congressional Record two decisions-- this Court's decision in Contractors Association of Eastern Pennsylvania v. Secretary of Labor, supra, and United States v. Ironworkers Local 86, supra, 118 Cong. Rec. 1665 (1972)(Leg. History, supra, at 1048). In opposing the amendment, Senator Javits argued that it would not only destroy the affirmative action concepts under Executive Order 11246, but would also "deprive the courts of the opportunity to order affirmative action under Title VII of the type which they have sustained in order to correct a history of unjust and illegal discrimination..." 118 Cong. Rec. 1665

(1972) (Leg. History, supra, at 1048). Similarly, Senator Williams argued that he was

> ... desperately afraid -- that this amendment would strip Title VII of the Civil Rights Act of 1964 of all its basic fibre. It can be read to deprive even the courts of the power to remedy clearly proven cases of discrimination. [118 Cong. Rec. 1676 (Leg. History, supra, at 1072)]

Senator Ervin's amendment was defeated that day by a vote of 22 to 44. 118 Cong. Rec. 1676 (Leg. History, supra, at 1074). Thus, we have very clear legislaive history not only of Congressional ratification and approproval of the broad remedial authority under Title VII and Executive Order 11246, but also clear ratification and approval of the authority to order numerical relief.

In the recent case of United States v. International Union of Elevator Constructors, Local Union No. 5, 538 F.2d 1012 (3rd

Cir. 1976), this Court rejected contentions that the imposition of affirmative remedies benefiting individuals who may not themselves have been victims of the unlawful discrimination were limited by Section 703(j).[16/] In so doing, the Court noted the "virtual unanimity in the lower federal courts that § 703(j) does not in this respect limit the courts' remedial powers." 538 F.2d at 1019. It also noted that in amending Title VII in 1972 Congress had indicated approval of the broad remedial authority of the courts, including the power to impose numerical remedies. The

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16/ Although the Court's analsyis was directed to Section 703(j), its analysis is also dispositive of contentions that the relief in this case is barred by Section 703(a). See also Contractors Association of Eastern Pennsylvania v. Secretary of Labor, supra, 442 F.2d at 173. (Sections 703(a) and (j), 42 U.S.C. §§ 2000e-2(a) and (j), are set out in the appendix to this brief.)

Court pointed out that in the section-by-section analysis of the 1972 amendments,[17] Congress had expressed the view that:

> In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

It also referred to the fact that Congress had rejected two amendments offered by Senator Ervin to forbid the courts from using numerical remedies to eliminate the effects of past discrimination after Senator Javits had cited the opinions in United States v. Ironworkers Local 86, supra, and Contractors Association of Eastern Pennsylvania v. Secretary of Labor, supra. Citing Runyon v McCrary,

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17/ 118 Cong. Rec. 7166 (1972) (Leg. History, supra, at 1844.)

___ U.S. ___, 96 S.Ct. 2586 (1976), the Court in Elevator Constructors found this "unusually clear evidence that Congress approved the pre-1972 federal court interpretation of the scope of Section 706(g) remedial powers." 538 F.2d at 1012-13.

IBEW attacks the Court's analysis of the legislative history in the Elevator Constructors decision. As to one of the amendments offered by Senator Ervin, it argues that the amendment was primarily aimed at restricting the Office of Federal Contract Compliance; that in the two decisions cited by Senator Javits, the courts had found the remedies not to be preferential quotas; and that, because it cannot be determined why the amendment was defeated, the defeat cannot be read as a congressional approval of those decisions. Of the second amendment, IBEW contends that it had only been intended to extend the

preferential treatment prohibition of Section 703(j) to the OFCC. However, the debate over the former amendment made it clear that what was deemed to be at issue was both the requiring of affirmative action under Executive Order 11246 and the ordering of quota remedies by courts to overcome the effects of past discrimination. (See Leg. History, supra, 1046, 1048, 1072).[18/]

18/ In arguing against the adoption of the Ervin amendment, Senator Javits stated, 118 Cong. Rec. 1665 (Leg. History, supra, at 1048):

> I would also like to cite in that regard the opinion in the United States v. Ironworkers Local No. 86, 443 F.2d 544, decided in the Ninth Circuit Court of Appeals as recently as May of 1971, in which the court held, in a Title VII "pattern or practice" case, that there was an affirmative duty for minority recruitment where it was shown that there was past discrimination which now required correction, and that the court could order that correction affirmatively

IBEW'S contention that the value of the legislative history is diminished because in the two cases called to Congress' attention the remedies were found not to constitute preferential quotas (IBEW brief pp. 42-43) is unpersuasive. Any such statements in those decisions merely con-

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18/ continued

> without violating section 703(j) related to preferential treatment of individuals of any group, and so forth, where there had been illegality. The court would not allow a respondent to profit from his own illegality under cover of section 703(j).
>
> Now, Mr. president, I am told, and I believe the information to be reliable, that under the decision made last week by Judge Bonsal in New York, in the Steamfitters case, an affirmative order was actually entered requiring a union local to take in a given number of minority-group apprentices.
>
> What this amendment seeks to do is to undo the Philadelphia plan and those court decisions. Incidentally, I take great pride in the fact that when the legality of the Philadelphia

stituted the legal conclusion that the relief was lawful. See, e.g., the aspects of the relief at issue in the Ironworkers case in the district court opinion, 315

18/ continued

plan was argued here, and we had an opinion of the Attorney General which held it lawful pitted against an opinion of the Comptroller General's Office which held it unlawful. I think I was the principal Senator who sustained the doctrine of legality. And I am very grateful, naturally, that the courts took that view.

So, there I believe that the amendment does two things, both of which should be equally rejected.

First, it would undercut the whole concept of affirmative action as developed under Executive Order 11246 and thus preclude Philadelphia type plans.

Second the amendment, in addition to dismantling the Executive order program, would deprive the courts of the opportunity to order affirmative action under Title VII of the type which they have sustained in order to correct a history of unjust and illegal discrimination in employment and thereby futher dismantle the effect to correct these injustices. (emphasis supplied).

F. Supp. 1212, 1247 (W.D. Wash. 1970). The legislative history makes clear that congress was not misled as to what was in fact at issue.

It is true, as IBEW notes, that it can never be completely determined why a particular amendment was defeated. However, that does not militate against a rule of statutory construction whereby the most logical inference is drawn, especially where the vote is overwhelming. The overwhelming rejection of the Ervin amendment was properly read by the Court in Elevator Constructors as a clear indication that Congress did not intend Section 703(a) or (j) to be a bar to such relief. 19/

19/ It is also noteworthy that Congress in 1972 in fact broadened the remedial language of Section 706(g) to include the words "or any other equitable relief as the court deems appropriate." In light of that fact, there is no merit in IBEW's attempt to rely on H. K. Porter v. NLRB, 397 U.S.

19/ continued

99 (1970) (IBEW brief, pp. 35-36), which held that the Board could not, even for remedial purposes, order the parties to reach agreement since Congress had never given the Board the authority to order employers and unions to agree. Here the district courts, subject only to constitutional limitations, have the broadest possible power to fashion relief.

IBEW (brief, pp. 31-32) places reliance on the last sentence of Section 706(g), which reads:

> No order of the courts shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled., or was refused employment or advancement or was suspended or dischaged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

As noted above with respect to Sections 703(a) and (j), this Court and eight other courts of appeals have found that language not to be a bar to affirmative numerical remedies.

The appellants efforts to bring into operation the language of Sections 703(a) or (j) to bar the relief in this case because here, unlike the case of hiring goals, the expectation of incumbents are affected are without merit. As discussed infra, pp. 34-35, the Elevator Constructors case did involve relief affecting the interests of incumbents. Morover, it is simply impossible to read the language of those sections to permit relief in the hiring case while barring it in the case of promotions.

CWA and IBEW also contend that the override aspect of the decree and supplemental order is barred by Section 703(h) of Title VII.[20/] Both find support in Franks

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20/ Section 703(h), 42 U.S.C. § 2000e-2(h), is set out in the appendix to this brief.

v. Bowman Transportation Co., 424 U.S. 747 (1976). Rather than supporting their position however, the Franks decision disposes of any contention that Section 703(h), restricts the relief available to correct prior discriminatory practices. In holding that Section 703(h) could not bar the grant of retroactive seniority to remedy discrimination the Court in Franks reasoned (424 U.S. at 758-59):

> On its face, § 703(h) appears to be only a definitional provision, as with the other provisions of § 703 subsection (h) delineates which employment practices are illegal and thereby prohibited and which are not. Section 703(h) certainly does not expressly purport to qualify or proscribe relief otherwise appropriate under the remedial provisions of Title VII, §706(g), 42 U.S.C. § 2000e-5(g), in circumstances where an illegal discriminatory act or practice is found. Further, the legislative history of § 703(h) plainly negates its reading as limiting or

qualifying the relief authorized under §706(g). 21/

21/ After examining the legislative history, the Court concluded (id., at 761-762).

> Accordingly, whatever the exact meaning and scope of § 703(h) in light of its unusual legislative history and the absence of the usual legislative materials, see Vaas [Title VII. Legislative History, 7 B.C. Ind. & Comm. L. Rev. 431 (1966)] at 457-458, it is apparent that the thrust of the section is directed towad defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act. There is no indication in the legislative materials that §703(h) was intended to modify or restrict relief otherwise appropriate once an illegal discriminatory practice occuring after the effective date of the Act is proved--as in the instant case, a discriminatory refusal to hire.
>
> (footnote omitted)

This Court so read the Franks decision in its Elevator Constructors decision, supra, stating (538 F.2d at 1019):

> Local 5 contends, however, that the enforcement provisions in § 706(g) are in effect limited by the unlawful employment practices prohibitions in §§703(h) and (j). The short answer to that contention is that § 703 defines violations, not remedies. The section binds employers and labor organizations. It binds the court to the extend that it curtails the court's power to find a violation, but § 703 is simply inapplicable to the relief which may be afforded once a violation has been found. Thus a court could not predicate a finding of violation upon the existence of a bona fide seniority system such as § 703(h) describes, or upon the mere failure to institute an affirmative action program of the kind to which § 703(j) refers. But the court's remedial powers are not limited by these provisions. That is made abundantly clear by the holding in Franks v. Bowman Transportation Co. supra, that artificial seniority may, pursuant to § 706(g), be awarded as a remedy for past discrimination.

As discussed infra, pp. 33-34, this decision was made in the context of relief

overriding the expectations of incumbents in favor of minorities not identified as victims of the prior discrimination. Thus this Court must have read the Franks ruling with respect to the reach of Section 703(h) as not limited to relief to identiable victims. This was a proper reading of that decision. The Court held that Section 703(h) merely defined violations and was not intended to permit seniority systems to stand as a bar to appropriate Title VII relief. There may be questions as to whether relief to persons not individually identified as victims is appropriate but there is simply no basis in the statute for reading 703(h) as a limitation on the authority to grant relief if otherwise appropriate.

CWA and IBEW also seek to rely on this Court's original decision in Jersey Central Power & Light Co. v. Local 327, IBEW, 508

F.2d 687 (3d Cir. 1975), and the subsequent per curiam decision remanding the cause to the district court, ___ F.2d ___, 13 FFP Cases 762 (3d Cir. 1976), after the Supreme Court had sent the case back for reconsideration in light of Franks, ___ U.S. ___, 96 S.Ct. 2196 (CWA brief pp. 21-32, IBEW brief, pp. 51-53). As this Court pointed out in Elevator constructors, supra, 538 F.2d at 1020, the Jersey Central decision "is not in point because it did not deal with the scope of judicial remedy afforded in 706(g) for a § 703 violation." The original opinion, dealing only with the question of whether the use of plantwide seniority to determine layoff status violates public policy (as expressed in Title VII), held that Section 703(h) precluded a finding of a Title VII violation even where such layoffs perpetuated past discrimination. 508 F.2d at 704-711.

The Court's opinion on remand merely holds that in light of Franks, layoffs of identified individuals who were shown to have been the victims of hiring discrimination would be a violation of Title VII, notwithstanding the provisions of Section 703(h).

It is true that the Jersey Central opinion on remand does appear to draw a distinction between identified and non-identified victims of previous discrimination. In the context of the layoff situation before the Court in that case and in view of the emphasis in the original opinion on the "intention to discriminate" as the sole exception to the bona fides of a company service seniority system (508 F.2d 711), that distinction may have validity. Where persons have lower seniority because of a discriminatory refusal to hire at an earlier date, the reduced seniority is plainly the result of an

intention to discriminate; where an individual was not a victim of hiring discrimination the lower seniority is not a result of an intention to discriminate as to that person.[22/] Whatever the merit of drawing such a distinction in the Jersey Central context, it is not inconsistent with the Court's reading of Franks in Elevator Constructors. Section 703(h) does not apply at all with respect to the remedy for past class discrimination which has been carried into a seniority system. There is thus no basis in Section 703(h) for distinguishing between identifiable victims and other members of the previously disadvantaged group if group relief is otherwise appropriate.

22/ Such an interpretation of 703(h) is consistent with opinions of the Fourth Circuit. See Patterson v. American Tobacco Co., 535 F2.d 257, 266 (4th Cir. 1976); Russell v. American Tobacco Co., 528 F.2d 357, 363 (4th Cir. 1975).

In sum, all of appellants' statutory objections to the authority of the district court to order the relief at issue in this case are foreclosed by the legislative history of the 1972 Act and the settled law of this Circuit.

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Nos. 82-206 and 82-229 (Consolidated)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FIREFIGHTERS LOCAL UNION NO. 1784,
Petitioner

v.

CARL W. STOTTS, *et al.*,
Respondents

MEMPHIS FIRE DEPARTMENT, *et al.*,
Petitioners

v.

CARL W. STOTTS, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONERS

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IN THE

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OCTOBER TERM, 1983

No. 82-206

FIREFIGHTERS LOCAL UNION NO. 1784,
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CARL W. STOTTS, *et al.*,
Respondents

No. 82-229

MEMPHIS FIRE DEPARTMENT, *et al.*,
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v.

CARL W. STOTTS, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

REPLY BRIEF FOR PETITIONERS

Petitioners in these consolidated cases respectfully submit this joint reply memorandum in this matter pursuant to Supreme Court Rule 34.4.

ARGUMENT

I. The Appeal Is Not Moot

Respondents contend that this appeal is moot because (1) the preliminary injunction of the District Court is without continuing effect (Respondents' Brief pp. 24-

32) and (2) this matter is not one which is "capable of repetition yet evading review" (Respondents' Brief pp. 32-45). This matter is not moot, and even if it would otherwise be moot, it falls within that category of cases which are "capable of repetition yet evading review." Petitioners reassert their arguments contained in the Joint Opposition to Respondents' Suggestion of Mootness herein (hereinafter the "Joint Opposition")[1] and will limit their response herein to the points raised by Respondents in their brief on the merits herein.

Respondents have failed again to sustain their heavy burden of demonstrating mootness in their renewed argument. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953). They are incorrect in their assertion that the orders of the District Court have no con-

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[1] On May 23, 1983 Respondents filed a suggestion of mootness in these cases. On May 24, 1983 the clerk of the Court advised counsel for Petitioners that a response to this suggestion should be filed "as promptly as possible." Petitioners sought to comply and did so by filing their Joint Opposition to Respondents' Suggestion of Mootness on May 27, 1983. On June 6, 1983 the Court granted the petitions for a writ of certiorari in these cases and consolidated them for review. Respondents have renewed their suggestion of mootness in their brief on the merits (Respondents' Brief pp. 24-45).

Petitioners wish to advise the Court that two of the examples of continuing adverse effects of the injunctions on incumbent nonminority firefighters contained in the Joint Opposition have no application to the particular employees who were affected by the layoffs in controversy. First, no employee who was laid off in 1981 was eligible for automatic promotion to captain after 30 years' service (*see* Joint Opposition p. 5; Respondents' Brief p. 29). Second, no employee lost an opportunity to take examinations for the purpose of securing promotions to the next higher rank as a result of the injunction (*see* Joint Opposition p. 6 n.1; Respondents' Brief pp. 29-30). All other continuing effects of the injunction referred to in the Joint Opposition do impact individual employees. Petitioners wish to apologize to the Court for the aforementioned inaccuracies. As noted above, the Joint Opposition was prepared hastily to comply with the advice of the clerk of the Court to file our response "as promptly as possible."

tinuing effects. Not only did laid-off workers and demoted employees lose pay, but the nonminority incumbents who were placed on layoff status as a direct result of the District Court's injunction, Harmon, Dennington and Darden, have lost competitive seniority in relation to all other individuals in the class of 32 fire privates from which they were hired, including those minority employees who would have been laid off but for the District Court's orders (*see* Respondents' Brief, Appendix D).[2] Even if the Court confines its inquiry to these three individual employees, as Respondents have done, it is clear that those orders have continuing effects on those employees. These individuals have been rendered less senior for purposes of future job decisions and entitlements, including a lessened expectation of future promotion, a decreased priority in bidding on certain jobs and job transfers, and loss of seniority for future layoffs.

Respondents attempt to explain away these continuing effects by contending that they are de minimis (Respondents' Brief p. 32). While Petitioners dispute that such effects are de minimis, an otherwise live controversy is not moot merely because the direct consequences of the lower court's ruling are continuing, yet de minimis in nature. To the contrary, this Court has held that even

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[2] In accordance with the City's Layoff Policy, as modified by the District Court's injunction, all employees who were adversely affected thereby were laid off from their classification (J.A. 85). Among those who were so laid off, higher-ranking employees were entitled to "bump down" or accept a demotion to a lower rank (J.A. 85). The lowest-ranking employees had no bumping rights, and were placed on layoff status (J.A. 85). Contrary to Respondents' position that employee demotions are not included within the scope of the Questions Presented herein by Petitioners (Respondents' Brief p. 15 n.15), the issues raised in this matter concerning both layoffs and demotions are fairly included in the Questions Presented. *See* Sup.Ct.R. 21.1(a). *See also Peters v. Kiff*, 407 U.S. 493, 494 (1972). As employed herein, the term "layoffs" will include within its contemplation both layoffs and demotions attendant thereto, unless otherwise noted.

potential collateral consequences of an order can suffice to keep an otherwise moot question live for purposes of review before this Court. *See Sibron v. New York*, 392 U.S. 40, 55 (1968). The instant case presents the Court with direct and continuing adverse consequences of the lower court's injunctions,[3] the effects of which plainly are concrete and significant, despite Respondents' attempt to characterize them as trivial.

Respondents also contend that this appeal does not fit into that exception to the general rule of mootness in cases that are "capable of repetition yet evading review." (Respondents' Brief pp. 32-45.) To support this contention, Respondents raise three main arguments: (1) future layoffs would not involve an identity of parties with that involved in the instant dispute (Respondents' Brief p. 37); (2) layoffs and the controversies they engender are not so inherently short-lived as to evade full appellate review (Respondents' Brief pp. 39-45); and (3) there is no reasonable expectation that layoffs will recur (Respondents' Brief pp. 33-35). None of these arguments has merit.

First, any future layoffs would, in fact, involve an identity of parties with that involved in the instant dispute. The analysis that has been utilized by this Court requires that "the same complaining party would be subjected to the same action again." *See Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam). However, when the case under review involves a class action, the

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[3] In this respect, the instant case is similar to *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175 (1968). In *Carroll*, all that remained for review by this Court was the validity of a 10-day restraining order which enjoined an organization from holding certain rallies for a period that had long since passed when this Court undertook review. However, the Court held that the appeal was not moot because "Petitioners have sought to continue their activities . . . and it appears that the decision of the Maryland Court of Appeals [upholding the 10-day injunction] continues to play a substantial role in the response of officials to their activities." *Id.* at 178.

Court has proceeded with the assumption that the class representative stands in the place of those who will be adversely affected by the complained-of action in the future. *See, e.g., Sosna v. Iowa*, 419 U.S. 393 (1975).

It is Respondents who might be considered the "complaining party," as they allegedly were aggrieved by the City's application of its seniority system in the layoff circumstance. Respondents are, in fact, a court-certified class including all present and future black employees of the Memphis Fire Department (City Pet. A.61). If layoffs recur, during the life of the consent decree, members of the Respondent class will be subjected to the same complained-of action again.

The City and the Union may also be viewed as the complaining parties, having been enjoined from the routine application of their nondiscriminatory seniority system in favor of a contested interpretation or modification of the consent decree. If layoffs recur, the identity of these parties will not change. Thus, under either analysis, the same complaining party will be subjected to the same action.

Second, layoffs and the controversies they engender are of that type of cases that are typically so short-lived as to evade full appellate review. This Court has recognized that layoffs are ordinarily "[a] period during which a workman is *temporarily* dismissed." *Fishgold v. Sullivan Dry Dock & Repair Corp.*, 328 U.S. 275, 287 n.11 (1946); *CBS, Inc. v. International Photographers, Local 644*, 603 F.2d 1061, 1063 (2d Cir. 1979). As such, layoffs are similar in nature to economic strikes which have been recognized to be of comparatively short duration, even though there are exceptions. *See Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 126 (1974).[4] Like economic strikes, the great majority of

[4] The problem of layoffs and concomitant demotions in public employment that underlies this dispute is of continuing practical significance, as Respondents point out (Respondents' Brief pp. 40-

layoffs and reductions in force do not last long enough for complete judicial review of the controversies they engender. *Id.* Thus, this case falls squarely within that category of cases to which the "capable of repetition yet evading review" exception has been applied by the Court.

Finally, while no party to this dispute desires a recurrence of the 1981 layoffs, a reasonable expectation exists that layoffs will recur within the life of the consent decree.[5] Although the City has faithfully adhered to it, the consent decree is anticipated to remain in force for some time to come. During that extended period, the same principal factors which combined to make necessary the 1981 layoffs, legal prohibitions against deficit spending by the City,[6] a limited tax base, and high interest rates,[7] still persist, making reasonable the expectation that layoffs will recur if any single factor changes detrimentally. The City of Memphis has an extremely limited tax base. State or local income taxes may not be imposed in Tennessee, being unconstitutional. *Evans v. McCabe*, 164 Tenn. 672, 52 S.W.2d 159 (1931), interpreting Tenn. Const. Art. 2, § 28. The two principal sources of income for a municipality in Tennessee are the sales tax and ad valorem real property tax. The City is now levying sales tax at the maximum rate allowable under state law. *See*

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41). The important questions raised by this appeal must be resolved to give needed direction to litigants and the federal judiciary.

[5] It is the City, rather than Respondents, who is in a better position to evaluate the potential for future layoffs.

[6] *See* T.C.A. § 6-56-205.

[7] The 1981 layoffs were necessitated in no small part by the high interest rates persisting at that time. While Respondents disingenuously speculate that the factors contributing to the 1981 layoffs will not recur until 2143 (Respondents' Brief p. 34), there are concrete indications that interest rates may again be on the rise. *See* Wall St. J., Nov. 14, 1983 at 1, col. 5. Petitioners would again point out that similar actions have recently been necessitated in many other cities within the recent past. *See* Union's Brief pp. 19-20.

T.C.A. § 67-3050. It cannot raise the sales tax. While property taxes were decreased on a one-time basis recently upon the last sales tax increase, that tax is likewise near its limits. Tennessee law dictates that industrial and commercial property be assessed for ad valorem property taxation purposes at forty percent (40%) of its value, while residential property be assessed at twenty-five percent (25%) of its value. Tenn. Const. Art. 2, § 28. Therefore, any increase in property taxes discourages new business and industry from moving into Memphis. Given these limits on the ability of the City to raise revenue, prevailing high interest rates and constantly increasing expenditures for employee wages, employee health care and utility costs, the situation warrants a conclusion that there is a reasonable expectation of future layoffs during the period the consent decree is in effect. At the very least, Respondents have failed to meet *their heavy burden* to establish mootness.

II. The District Court Failed To Properly Apply The Law

A. *The Appropriate Standard of Review*

Petitioners acknowledge that the grant of a preliminary injunction is generally reviewable only for an abuse of discretion. *See University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Of course, improper application of the law is itself an abuse of discretion. *See, e.g., United States v. School District of Ferndale*, 577 F.2d 1339, 1350-51 (6th Cir. 1978). A limited standard of review is appropriate if, as is ordinarily the case at a preliminary injunction hearing, the District Court merely acts to preserve the status quo until a trial on the merits can be held, the injunction is based on an abbreviated set of facts, and the record indicates the necessity for a full trial on the merits to resolve the controversy. *See Camenisch*, 451 U.S. at 395, 397.

Consistent with this reasoning is the rule that when the availability of preliminary relief turns on interpretation of the law rather than on the facts, the appellate

court is free to review de novo the district court's judgment. *E.g., Pratte v. NLRB*, 683 F.2d 1038, 1040 (7th Cir. 1982). The instant case is one to which this rule applies. At the hearing on Respondents' request for preliminary injunctive relief, the facts were uncontroverted, with counsel for Respondents conceding the City's financial need to layoff certain of its employees in the Fire Division (J.A. 75).

Unlike *Camenisch*, the Respondents' prayer for preliminary relief came at a time when this litigation was more than four years old, after years of extensive discovery and intensive negotiations with which the District Court was thorougly familiar (City Pet. A. 2; Respondents' Brief p. 61). It followed the entry of a consent decree resolving Respondents' claims against the City from which Respondents had represented that they would seek no further relief save to enforce the provisions of the decree itself (City Pet. A. 61). The District Court at no time indicated that further proceedings would be necessary in the seven weeks between the hearing and the commencement of layoffs or that the record needed further development before a decision could be made (J.A. 29-81; City Pet. A. 72-76). *Cf., Camenisch*, 451 U.S. at 397-98.

It is clear from the record that a subsequent trial on the merits never was contemplated by Respondents or the district judge. Rather than remaining within the office of a preliminary injunction, which "is merely to preserve the relative position of the parties until a trial on the merits can be held," *id.* at 395, the District Court granted relief which *changed* the relative positions of the parties as a result of that Court's erroneous view of the law (*see* J.A. 30-31; City Pet. A. 72-76; City Pet. A. 11 n.6). Contrary to Respondents' assertion that the lower courts merely preserved the status quo, the status quo was the application of the seniority system or Layoff Policy in light of (1) the City's policy to lay off based on seniority

in existence since 1973 and embodied in the Memorandum of Understanding with the Union since 1975, and (2) the fact that the consent decree in no way modified or even addressed the manner in which the City could conduct layoffs. Nevertheless, the District Court enjoined the seniority-based layoffs.

Under these circumstances, it is proper for the Court to engage in de novo review of the District Court's judgment. However, even if a de novo review of the judgment is not in order, Petitioners submit that the courts below erred in applying the law. Therefore, under the abuse of discretion rule, the judgment must be reversed, as well.

B. *The District Court's Injunctions Did Not Result From a Mere Interpretation of the Consent Decree*

Respondents assert that the proposed seniority-based layoffs at issue herein would have violated the terms of the consent decree (Respondents' Brief p. 52), and that the District Court's injunctions merely compelled compliance with the terms of the consent decree on the part of the City (Respondents' Brief p. 53.). The Court of Appeals agreed (City Pet. A.33). This assertion and ruling cannot withstand analysis.

The record is clear that the consent decree resulted from arm's length negotiations between the City and Respondents. The City agreed to specific limitations on its managerial prerogatives in regard to the hiring and promotion of minority personnel in order to achieve long-term hiring and promotional goals in its Fire Division (City Pet. A.64-65). The consent decree did not contain rigid timetables for hiring and promotion. *Cf. Brown v. Neeb*, 644 F.2d 551 (6th Cir. 1981). Neither did the City agree that once a given percentage of minority representation was *attained* in a rank, that percentage (or those individuals) must be *maintained* through insulation of minority employees from adverse job actions, nondiscriminatory in purpose, that remained within the City's management prerogatives.

As Respondents concede, once a consent decree has been approved, any claims for additional relief are to be judged by reference to the terms of the settlement itself (Respondents' Brief pp. 50-51). However, the relief they secured, in fact, went well beyond that afforded by the explicit terms of the consent decree and was awarded without reference to the terms of the settlement. Respondents cannot point to a single term of the consent decree that was violated by the City or would have been violated by the City by the implementation of the Layoff Policy at issue herein. The District Court noted that Respondents had made no suggestion that the City had been contemptuous (City Pet. A.75). Neither did Respondents contend that the Layoff Policy was motivated by a discriminatory purpose or by a desire to evade the requirements of the consent degree (Respondents' Brief p. 37).

Respondents do attempt, however, to make a case for asserted consent decree violations by the City. First, they charge that the demotions under the Layoff Policy of "Exhibit A" promotees violated ¶ 9 of the decree. Under examination, ¶ 9 requires the City to make those promotions, which were, in fact, carried out. Paragraph 9 does not, however, require the City to maintain Exhibit A promotees in rank while laying off their fellow white employees. Paragraph 9 in no wise contemplates an insulation from nondiscriminatory employer responses to adverse economic conditions. The City at all times reserved its right to lay off.

Second, Respondents assert that ¶¶ 6, 7 and 8 committed the City "unconditionally" to maintain minority representation on the Fire Department once a given level had been achieved. Under examination, the consent decree contains an obligation on the part of the City to make reasonable, good-faith efforts (City. Pet. A.64, ¶ 6), to raise the percentage of minorities in the long term (City Pet. A.64, ¶ 6) and to hire (City Pet. A.64, ¶ 7) and promote (City Pet. A.65, ¶ 8) minority applicants in cer-

tain percentages. The City did not renounce these commitments by implementing its Layoff Policy, part of which insured the right to return to former positions once the conditions creating the need for layoffs had been alleviated.[8] The City's managerial prerogative to lay off its employees by seniority was not surrendered in the consent decree. These paragraphs of the consent decree do not require the maintenance of certain levels of minority employment once achieved, nor do they insulate minorities from layoffs or demotions made pursuant to a bona fide seniority system.[9] Taken in sum total, Respondents' "interpretation" argument fails and reinforce the position of the Petitioners that Respondents are only entitled to enforcement of the actual terms of the consent decree as is made clear by an application of *Armour* to this case. *See United States v. Armour & Co.*, 402 U.S. 673 (1971) (Union Brief p. 16).[10]

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[8] Respondents admit that the uncontroverted evidence adduced at the May 8 preliminary injunction hearing was to the effect that the layoffs and demotions would be temporary in nature (Respondents' Brief p. 47). Also, the Layoff Policy contained a recall procedure (J.A. 89-90) that assured Respondents that they would be given the opportunity to return to their former positions before hiring and promotions resumed. These policies were consistent with the City's obligations under consent decree. The assertion made by the Court of Appeals and repeated by Respondents that the Layoff Policy amounted to an anticipatory repudiation (Respondents' Brief p. 53) is insubstantial and unsupported by the record.

[9] As set forth in the City's Brief on the Merits at p. 21, seniority-based layoffs would have had no greater adverse impact upon the achievement of the long-term goals under the consent decree than the layoff plan imposed upon the City by the District Court.

[10] Petitioners find it particularly revealing that Respondents fail to mention anywhere in their Brief on the Merits their waiver of their right to seek further relief contained in the consent decree.

C. *The District Court Exceeded Its Authority In Its Modification Of The Consent Decree*

Having demonstrated that the relief granted to Respondents was not contained within the four corners of the consent decree, Petitioners now turn to examine Respondents' contention that the District Court was acting within its authority when it modified the consent decree. Petitioners would show that the District Court failed to apply the correct rule of law in concluding that the consent decree should be modified and that the District Court must be reversed.[11]

As set forth in *Gautreaux v. Pierce*, 353 F.Supp. 423 (N.D. Ill. 1982) (cited in Respondents' Brief at p. 68), a consent decree embodies both a contract and a court order so that a party seeking to modify it faces a rather substantial burden. *Id.* at 426. The party opposing modification has a justified expectation that a bargain freely entered into will be honored. *Id.* As a result, the district court is not free to rewrite the terms of the decree and then enforce the decree as rewritten. *Id.* at 425-26. Certainly, those rules of general applicability carry much more force in the instant situation in view of the Respondents' waiver of further relief (City Pet. A.61).

Undaunted by these factors, Respondents urge the Court to judge the validity of the District Court's modification

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[11] **The analysis utilized by the District Court was as follows:**

> **Now, the appellate authorities, and most particularly the Sixth Circuit authority, has spoken to this subject when you have a consent decree and there has been a change of circumstances. And then the district court can, and should be, called upon to determine whether some layoffs, and the method of laying people off is going to create discrimination, which the consent decree undertook to avoid.**
>
> **Now, I guess you might say that this court figures that, based on the results of the hearing, the court does have authority, if the record supports it, to tell the city that they cannot lay people off in a manner that will perpetuate discrimination against black people. Now, it is that simple. (J.A. 30)**

against the standard whether the change would serve to effectuate or thwart the basic purpose of the consent decree (Respondents' Brief p. 67). A more thorough analysis is in order.

As a threshold matter, exceptional circumstances, new, changed or unforeseen at the time the decree was entered, are required in order to justify modification of the decree. *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932). While the District Court concluded that the consent decree did not contain a layoff provision (City Pet. A.73), it did not state that the City's planned layoffs presented the parties with an exceptional circumstance which would justify modification (*see* City Pet. A.72-79). In fact, the uncontroverted facts adduced by the District Court established that the City contemplated that the layoffs would be temporary and that the City had not lost its resolve or breached its commitment to comply with the consent decree (A.39).[12] Thus, the relief granted Respondents under the consent decree would not have been demonstrably "destroyed" (Respondents' Brief p. 68), nor had the City's conduct amounted to a violation of the terms of the decree. *Cf. Brown v. Neeb*, 644 F.2d 551 (6th Cir. 1981). Neither had events following the entry

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[12] Mayor Chandler emphasized in his testimony before the District Court that the City had not renounced its obligations under the consent decree:

> But I hope that you understand, and I certainly want Judge McRae to understand, that they are not losing what they gained by the promotion to lieutenant, because they are kept on a roster, and it is absolutely most certain that all of those people would be restored to their positions as lieutenant, they now having been bumped down, or having been bumped down because they are less senior. And being lieutenants, because they were promoted under this policy, we bump down temporarily, and in all likelihood will be back as a lieutenant maybe within six months, and certainly within a two year period. (J.A. 39)

of the consent decree established that the consent decree would fail to accomplish its intended result. *Cf. United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 249 (1968).

The theoretical underpinning of Respondents' position, as well as the decisions of the courts below is as follows: had the City been permitted to apply its Layoff Policy, the relief granted under the consent decree would have been destroyed. A careful review of the uncontroverted facts shows the concept to be analytically unsound. The relief granted under the consent decree was, in essence, that the Memphis Fire Department would raise the level of minority employment in each rank to levels approximating the percentage of blacks in the labor force in the area on a long-term basis (City Pet. A.64). There was no deadline imposed for attaining this long-term goal. There was no provision requiring that a percentage be maintained once attained. Given that all those laid off or demoted were to be reinstated to their former positions before any further hiring took place, there was no threat that the attainment of the long-term goal would be delayed, much less "destroyed," if the Layoff Policy had been applied. In other words, had the Layoff Policy been applied the City would have reached its long-term goal at the same time it would under the application of the Court's order.

Assuming arguendo that exceptional circumstances were demonstrated, the District Court should then have weighed the equities in determining the hardship upon the moving party if modification was not granted and the hardship on the party opposing modification if the Court granted the relief sought, as well as the impact of modification upon innocent third parties. The District Court failed to engage in this important analysis. The City in this case had retained its managerial prerogative to implement its seniority policy should layoffs be necessitated. Respond-

ents had failed to seek constructive competitive seniority in their lawsuit or even to allege that the minority employees who would be benefited by the requested relief were, in fact, "victims of discrimination." On the other hand, innocent nonminority incumbent employees suffered greatly as a result of the District Court's injunctions.[13] In sum, the modification was inequitable and must be reversed.

III. The Relief Sought By Respondents Is Unavailable Under The Statutes They Seek To Enforce

Respondents misrepresent Petitioners' position as being "that a consent decree is invalid if it provides relief to a black who is not a proven victim of discrimination" (Respondents' Brief p. 89). Such a contention, they point out, would virtually abolish consent decrees in Title VII cases, if sustained (Respondents' Brief p. 90). Respondents have misrepresented Petitioners' position herein in order to divert the Court's attention from the weakness of their own position on the merits.

Petitioners argue not that parties are forbidden from agreeing to provide affirmative relief, but rather that a court cannot order a racial quota to provide competitive seniority relief to those who are not victims of discrimination. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). As set out above in Section II, Respondents are neither entitled to the relief sought based upon the consent decree, nor are they entitled to a modification of the consent decree which provides such

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[13] For instance, Lt. Donald Wolfe, a white incumbent who was hired on July 16, 1968, was demoted while Percy Alexander, a black lieutenant who was hired on January 2, 1973, was retained in his position. Likewise in the inspector rank, Phillip T. Hall, a white employee who was hired on March 17, 1969, was demoted while Raymond McGehee, a black inspector who was hired on June 5, 1972, was retained in his position.

relief. Even if the District Court was correct under those circumstances in entertaining an application for the relief sought, Respondents would have had to prove their cause of action to obtain further relief. Respondents could not bypass the liability phase of litigation and proceed directly into the remedial phase to secure additional relief. In order to obtain the new relief sought, Respondents should have been required to establish their entitlement to such relief at the outset. Since Respondents were proceeding under Title VII, and 42 U.S.C. §§ 1981 and 1983, the relief sought necessarily would have had to be relief available under those statutes in a contested matter or litigated case.

Petitioners digress to note that prior decisions by this Court have established that parties are not prohibited by Title VII from consenting to race-conscious relief or relief in the absence of adjudicated victim status. *United Steelworkers v. Weber*, 443 U.S. 193 (1980).[14] However, the permissible range of relief to which parties to Title VII litigation may agree is broader than that which a court can impose upon the parties against their will. Petitioners assert straightforwardly that Title VII does not authorize the judicial award of constructive competitive seniority to persons who are not actual victims of discrimination in a *contested* case. It was not Petitioners' contention, or intention to assert or imply, that consentual relief of the type the City agreed to herein—hiring and promotional relief to persons not adjudicated victims—could not be agreed to and made part of a consent decree. Respondents' erroneous restatement of Petitioners' argument flies in the face of the City's conduct. The City has always maintained that the consent decree

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[14] In *Weber*, the Court also made it clear that it was not deciding, in that case, what a court might order to remedy a past proved violation of the Act. *Id.* at 200.

as agreed to is reasonable, equitable and lawful, has faithfully adhered to its obligations under the decree and has even defended the same against attack from third parties (*see* City Pet. A.62). *Stotts v. Memphis Fire Department*, 679 F.2d 579 (6th Cir.), *cert. denied sub nom. Orders v. Stotts*, 103 S.Ct. 297 (1982). Rather, it is Petitioners' position that a court may not impose the relief sought by Respondents in May, 1981 in the absence of adjudicated victim status, and that the quota relief imposed by the District Court exceeded its authority.[15]

To suggest as Respondents do (Respondents' Brief p.70) that the District Court's order does not mandate the use of a race-conscious standard in layoffs in light of its terms is ludicrous. The order mandates that in order to preserve the then-existing percentage of minorities on the Department, a disproportionate number of innocent incumbent whites be laid off or demoted pursuant to the order.[16] Thus, in the selection of those persons who would be laid off or demoted, the City was required by the Court's order, as it went down the seniority roster, to

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[15] Respondents' only response as to the validity of petitioners' legal analysis of the limits of Title VII is a brief mention of the argument purportedly arising from the legislative history of the Equal Employment Opportunity Act of 1972. Petitioners adopt the response to that argument set out in the Reply Brief for Petitioner, Boston Firefighters Union, Local 718, in the *Boston Firefighters* case, Nos. 82-185, 82-246 and 82-259, heard by the Court last term (Boston Firefighters' Brief, pp. 10-17).

[16] The May 18 order provides in pertinent part:

> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the defendants shall not apply the seniority policy proposed insofar as it will decrease the percentage of black lieutenants, drivers, inspectors and privates that are presently employed in the Memphis Fire Department. The defendants should file a proposed plan to comply with this Court's injunction. (City Pet. A.78)

skip over or favor minorities solely because of their race. Clearly, the order required the use of a race-conscious standard in the selection of those employees to be adversely affected by the Layoff Policy or seniority system.

Likewise, the provision in the order requiring defendants to file a proposed plan to comply with the injunction demonstrates that Respondents are absolutely incorrect when they assert that "it was the city, not plaintiffs or the trial judge, which selected the race-conscious plan . . ." and that "the Court's June 25 order merely 'approved' the method selected by the city itself" (Respondents' Brief p. 76). It was the District Court, at the behest of Respondents, which ordered that the race-conscious plan be prepared and which approved the plan.

Interestingly, Respondents now argue in support of their position that there was no need for layoffs in the Fire Department, and that there were alternatives to layoffs and demotions (Respondents' Brief pp. 74-76). Yet, at the May 8 hearing, Respondents' counsel conceded the need for the City's action (J.A. 75). Further, as indicated by the District Court at the inception of the hearing, the District Court had no jurisdiction to determine whether the City could or could not lay off employees.[17] *See National League of Cities v. Ussery*, 426 U.S. 833 (1976). *No* party took exception to that ruling by the Court. In sum, those matters raised by Respondents speculating as to the need for and alternatives to layoffs

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[17] The District Court noted at the outset of the hearing:

> . . . [O]ne of the things that I did determine, and I state before we start the hearing, that I see no area where this Court has the authority to tell the City officials that they cannot, based on their own judgment, lay off some people. Now, I don't know whether people think I'm going to tell the City that they can't lay anybody off, but I have ruled that that is not an issue. (J.A 30).

and demotions are inapposite and entirely outside the record before this Court.

The argument that the system in operation is not a seniority system because it utilizes a facially neutral and nondiscriminatory alphabetical tie breaker is specious. As this Court has acknowledged, all seniority systems have ancillary provisions that accomplish necessary functions in the system, but are not directly related to an employee's length of employment. *California Brewers Association v. Bryant*, 444 U.S. 598, 607 (1980). The tie breaker is such a provision, and the system is nonetheless a seniority system despite its inclusion.

Further, the effects of the District Court's orders were not, as Respondents would have the Court believe, limited to three white employees who were placed on layoff status instead of three minority employees who held the same seniority date. The order also caused seven additional, senior white drivers to be laid off from their positions or demoted, five additional, senior white inspectors to be demoted, and nine additional, senior white lieutenants to be demoted. The true injustice was not the proposed action of the City in routinely applying its bona fide seniority system; the true injustice resulted from the application of the layoff/demotion system ordered by the District Court to the detriment of innocent incumbent employees. Relief is generally defined as "deliverance from oppression, wrong or injustice." *Black's Law Dictionary*, 1161 (5th ed. 1979). Where, as here, relief is granted in excess of the consent of the parties, and unsupported by any hearing on the merits or adjudication of wrongdoing, the concept is perverted and the order granting the relief must be reversed.

CONCLUSION

For the reason set forth above and in Petitioners' briefs on the merits, the decision and judgment of the Sixth Circuit should be reversed with instructions to dismiss the request for injunctive relief.

Respectfully submitted,

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Nos. 82-206 and 82-229

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

FIREFIGHTERS LOCAL UNION NO. 1784,
Petitioner,

—v.—

CARL W. STOTTS, ET AL.,
Respondents.

MEMPHIS FIRE DEPARTMENT, ET AL.,
Petitioners,

—v.—

CARL W. STOTTS, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS SUBMITTED BY THE AFFIRMATIVE ACTION COORDINATING CENTER THE NATIONAL CONFERENCE OF BLACK LAWYERS THE NATIONAL LAWYERS GUILD THE CENTER FOR CONSTITUTIONAL RIGHTS

[continued on inside cover]

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Chinese-American Citizens Alliance
Council of Minority Educators In Massachusetts Public Colleges and Universities
Educators United
Esperanza Unida
Gray Panthers
La Alianza Legal De Oregon
La Casa Legal
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League of Martin
Massachusetts Citizens Against the Death Penalty
Massachusetts State Division, American Association of University Women
Minority Law Students Association
National Anti Racist Organizing Committee
New England Minority Women In Business
Parish Council of Holy Angels Catholic Church
Vulcan Pioneers of Newark, N.J.
Willamette Valley Immigration Project
Women's Bar Association of Massachusetts
Women's Coalition, Inc.
Women for Economic Justice
Women's Job Counseling Center

Nos. 82-206 and 82-229

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

FIREFIGHTERS LOCAL UNION No. 1784

Petitioner,

v.

CARL W. STOTTS, ET AL.,

Respondents.

MEMPHIS FIRE DEPARTMENT, ET AL.,

Petitioners,

v.

CARL W. STOTTS, ET AL.,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

Brief Amici Curiae of the Affirmative Action Coordinating Center; The National

Conference of Black Lawyers; The National Lawyers Guild; The Center for Constitutional Rights and other organizations in support of Respondents.

Consent of Parties

Amici Curiae filed this brief with the consent of all parties in support of the position advanced by respondents. Letters of consent have been filed with the Clerk of this Court.

INTEREST OF AMICI CURIAE

The thirty-one organizations joining in this brief as amici curiae (see Appendix B) represent many sections of American society with diverse interests. They share a mutual concern that the Court use the decision in this case to advance the commitment to rid our nation of the devastation of racial discrimination and race hatred. They are

aware of the difficulty of this task.

These groups share an understanding that the continued exclusion of Blacks and other minorities from meaningful political and economic participation in public safety agencies is a legacy of slavery and racial discrimination.

Amici all recognize the importance in preserving seniority. They believe, however, that the Constitutional mandate to remove the badges and incidents of slavery must take precedence in this conflict.

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SUMMARY OF ARGUMENT

This is one of that handful of cases which raise issues going to the very heart of racial discrimination in the United States. In its affirmative action triolgy[1], this Court has ruled that affirmative action programs can sustain constitutional and statutory challenges. These challenges must be viewed in a larger context of what appears

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[1] Bakke v. Regents of California, 438 U.S. 265 (1978), upheld the use of race consciousness to remediate the present and past effects of racial discrimination.

Within the Bakke era, this court decided in United Steelworkers v. Weber, 443 U.S. 193 (1979), that Title VII of the 1964 Civil Rights Act permitted a voluntary race conscious agreement between labor and management to desegregate the employment work force. Most recently this Court affirmed the power of Congress to enact remedial legislation in racial set-aside percentages of public works contracts for minority enterprises, long excluded by racial discrimination from competitive bidding. Fullilove v. Kutznick, 448 U.S. 448 (1981).

to be a second post-Reconstruction era where legal and political gains obtained by minorities after long struggle have been seen by many as working against the interest of whites. As in the previous cases, these challenges must be rebuffed. The accumulated effects of long years of racial discrimination have created material and structural differentials between Blacks and whites which cannot be remedied only by the creation of race-neutral guidelines for the present and future. The racial discrimination which exists today is a legacy of slavery that has long been a mainstay of the U.S. labor market. The persistent and pervasive exclusion and underrepresentation of Blacks from employment is a badge and incident of slavery subject to remedy though statutes and the Thirteenth Amendment.

That Amendment provides the legal context in which this case should be seen. It provides the framework in which Title VII operates. The modification of the consent decrees accomplished a result consistent with the constitutional mandates of the Thirteenth Amendment. Section 703(h) is but one section of Title VII and cannot logically be read to deprive the Court of equity jurisdiction to assure that progress toward racial equality is not impeded. The layoffs attempted by the City of Memphis perpetuate the historic cycle by which minorities and women are impacted first and worst. This is true not only because they are last hired because of historic discrimination, but also because they lack the power to influence the employer to seek alternatives to layoffs. The City of Memphis considered no alternatives other than layoffs to respond to its budgetary

difficulties. It did not attempt to consult with minorities before instituting its plan, notwithstanding the City's clear knowledge that the layoffs would disproportionately impact on minority workers and would eliminate all the gains accomplished under the negotiated consent decrees. The City, instead of exploring means that would counter its economic setbacks without adversely affecting minorities, chose to undercut its affirmative action goals and simultaneously escape legal liability through seniority based lay offs. The actions of the City are prohibited by the Thirteenth Amendment and Title VII, and the remedies adopted by the Courts below do not contravene §703(h).

ARGUMENT[2]

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[2] As an initial matter, it is clear from (Footnote Continued)

I. THE LOWER COURT'S MODIFICATION OF THE CONSENT DECREES WAS AN APPROPRIATE EXERCISE OF JUDICIAL POWER PURSUANT TO THE THIRTEENTH AMENDMENT MANDATE TO ERADICATE THE BADGES AND INCIDENTS OF SLAVERY

(Footnote Continued)
the record that all of the firefighters laid off by the City of Memphis have been rehired. See, Petitioners' Brief in Opposition to Respondents' Suggestion of Mootness, pp. 2-3, and The Commerical Appeal, Memphis, May 17, 1982 at A12, attached to Respondents' Suggestion of Mootness. This change in the circumstances of the parties since the decision of the Court of Appeals removes the case or controversy necessary for the exercise of this Court's jurisdiction under Article III. The case should thus be deemed moot since it is in all relevant respects indistinguishable from Boston Firefighters Union, Local 718 v. Boston Chapter NAACP, ___U.S.___, 103 S.Ct. 2076 (1983). The magnitude of the issues presented for review by this case are of such dimension that they should not be addressed until a factual context arises which absolutely requires a decision from this Court. As Justice Frankfurter long ago pointed out with typical candor: "[I]ll considered advisory opinions before the event may become millstones around the necks of succeeding generations." Frankfurter, A Note on Advisory Opinions, 37 Harv.L.Rev. 1002, 1008 n.18 (1924).

Amici will not further address this issue since its fundamental nature assures that it will be adequately addressed by the parties.

A. INTRODUCTION

The amici believe the important doctrine of seniority should not become a convenient vehicle to steer the country toward a second repudiation of its civil rights commitments. The history of Black Americans begins with slavery and continues to the present economic crisis. America's main problem since slavery to the present period of economic retrenchment, continues to be the burden of racial stratification and the concomitant class disabilities.

One hundred years ago, several constitutional challenges to the Civil Rights Act of 1875, which prohibited discrimination in public accomodations or public places of amusement, came before the Supreme Court. In the Civil Rights Cases, 109 U.S. 3, (1883) the Court had to answer a fundamental

question: Did Congress have the power to pass legislation to enforce all of the substantive rights mandated by the Thirteenth and Fourteenth Amendments?

This decision culminated 15 years later in the Court's giving its legal blessing to racial segregation in Plessy v. Ferguson, 163 U.S. 537 (1896).

Although today discrimination may be more subtle and more refined, this Court is again faced with a fundamental question: Do the courts have the power to remove discrimination from the body politic and purge from this country the vestiges of slavery?

The Court's answer reflected the times. Justice Bradley, speaking for the majority, held inter alia that, although the Thirteenth Amendment clothed Congress with the "power to pass all laws necessary and proper for abolishing all badges and incidents of

slavery in the United States," he confined those badges and incidents to the legal disabilities imposed on slaves--such as not having the right to sign and enforce a contract or purchase and inherit property--the literal trappings of human bondage.

The restrictive versus expansive interpretation of badges and incidents of slavery between Justices Bradley and Harlan continues to be a critical choice for the Court today. Civil Rights Cases, 109 U.S. at 22, 36 (1883). Despite the Thirteenth Amendment, post-Reconstruction civil rights legislation, the elimination of "Jim Crow" segregation, the passage of the 1964 Civil Rights Act and other equal rights legislation in the 1960's and 1970's, plus countless court decisions advancing civil democracy for Blacks, the gaping disparate economic effects between Black and white groups continues to expand.

Thus, amici curiae submit that the Thirteenth Amendment must guarantee economic, as well as civil, democracy for Blacks in order for the Amendment to truly eliminate all badges and incidents of slavery[3].

The Thirteenth Amendment not only abolished the civil segregation of Blacks from conditions of involuntary servitude under chattel slavery but secured their right to compete for economic opportunities free of the burdens of race and previous servitude. Civil Rights Case, 109 U.S. 3 (1883); Jones v. Alfred H. Mayer Co., 342 U.S. 409 (1968).

Chattel slavery, the most barbaric condition known to human existence, both isolated the slave from social integregation

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[3] As someone said, "What good is the right to eat at Woolworth's when you don't have the money to buy a hamburger?"

and exploited the value of the slave's human labor by forcefully extracting work without pay[4]. Because slavery profited most from the exploitation of Black slave labor.

If the Court in Jones v. Alfred H. Mayer Co., supra, 342 U.S. 409, traced discrimination in housing to slavery by linking housing discrimination to segregation, segregation to the Black Codes, and the Black Codes to slavery, then an equal analysis applies to the "last hired, first fired" doctrine and practice.

Just as in the first post-Reconstruction South the economic and political conditions re-established the plantation system and form

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[4] For a full citation of authorities, see Brief for Amici Curiae of the Affirmative Action Coordinating Center, et al., in Boston Firefighters Union v. Boston Chapter, NAACP, ___ U.S.___, 103 S.Ct. 2076 (1983).

of "Jim Crow" segregation, the current economic cutbacks and the legal attack on the jurisprudence of affirmative action forms the basis for a second post-Reconstruction period of re-segregation throughout the United States[5].

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[5] The U.S. Government, through Assistant Attroney General Bradford Reynolds of the U.S. Justice Department, asks this Court to subordinate the interests of race conscious affirmative action in favor of seniority; to overrule the interpretation of the U.S. Constitution permitting color-consciousness for remediation of racial discrimination with a declaration mandating absolute racial color blindness; to replace racial goals and quotas with no numerically fixed percentage; to reject discriminated groups and insist on proof of individual discrimination to justify remediation; and to supplant the jurisprudence of equality of results with the notion of equality of theoretical opportunity. See for example, the government briefs in Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP, ___U.S.___, 103 S.Ct. 2076 (1983); Williams v. New Orleans, 694 F.2d 987 (5th Cir. 1982).

Institutional and structural racism cannot be cured simply by establishing non-racial criteria on the pretense that our history has corresponded with our ideals. Successful steps to eliminate the accumulated effects of long, long years of racial discrimination must include direct action against the present vestiges of the white supremacist past.

In the instant case, the City of Memphis and the class of Black discriminatees entered a consent decree requiring employment of qualified Black firefighters to remedy the past systematic exclusion of Blacks. The City then chose to resolve unanticipated budgetary problems through a seniority based reduction in force program. Had the District Court not enjoined the City, the devastating impact of the City's "last hired, first fired" policy would have produced a disproportionately

adverse dismissal of Black firefighters and a shaper decline in the minorities on the force.

As a result, Blacks, the historic victims of slavery and racism, are once more forced to bear the burden of discrimination directly traceable to their skin color, previous condition of servitude and the advantages granted to whites. The "last hired, first fired" practices adversely affect Blacks because of the American institutional slavery and its consequences. Amici invoke the protections of the Thirteenth Amendment to the United States Constitution in an effort to eliminate the continuing badges and incidents of slavery.

Technically, this case involves whether a seniority system may be modified in the context where the parties have previously settled litigation. In reality, this Court's

action will send a message to the country, Congress and the courts as to the national commitment to reversing the relentless racism that darkens this nation's history.

B. THE COURT'S EQUITABLE AUTHORITY TO MODIFY THE CONSENT DECREE IS NOT LIMITED BY SECTIONS 703(h) AND 706(g) OF TITLE VII.

Petitioners have argued inter alia that the lower court did not have the equitable authority to modify the consent decree concerning the layoffs.

Petitioners in the Memphis Fire Department, in particular, assert that §703(h) prevents the Court from changing the seniority system where there were no findings of discrimination made to support such a modification. Also, they claim that §706(g) is violated since relief was accorded to beneficiaries of the consent decree who were not themselves adjudicated victims of racial discrimination in hiring.

The notion that sections of Title VII could limit the Court's equitable jurisdiction stands constitutional analysis on its head. It presumes laws passed by Congress are the framework within which the Constitution is interpreted. It has been a fundamental principle of constitutional law since Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), that the Constitution provides the framework within which all statutes are to be interpreted, not vice versa.

The Civil War Amendments in general, and for the purposes of this case the Thirteenth Amendment in particular, provide the constitutional framework and context in which to analyze both the lower Court's ruling and the Petitioners' arguments. Placed in this context it must be concluded that the Court has the equitable authority to modify the decree.

The Sixth Circuit in the present case supported its decision in general terms by reference to the policies inherent in Title VII and §§1981 and 1983 of 42 U.S.C. It emphasized how incongruent it would be if the Court were to be deprived of powers to vindicate the policies within these laws because the parties (acting in the explicitly preferred manner) had agreed upon and the court had entered a consent decree resolving the pending litigation.

Amici assert that the policies referred to by the Sixth Circuit have at least one source in the Thirteenth Amendment--its command to abolish all badges and incidents of slavery.

This Court in Jones v. Alfred H. Mayer Co., supra, 392 U.S. 409, and Runyon v. McCrary, 421 U.S. 160 (1976), in substance and effect, rejected the narrow view of

"badges and incidents" of slavery articulated by Justice Bradley in the Civil Rights Cases, supra,109 U.S. 3. The Court in Jones v. Mayer used language which embraced the spirit of Justice Harlan's dissent in the civil rights cases where Justice Harlan held the Thirteenth Amendment to protect Blacks from all discriminations based on race and concepts of racial inferiority[6]. Dred Scott v. Sanford, supra, 60 U.S. (19 How.) 393.

At the time plaintiffs in this action began their litigation, there was a gross underrepresentation of minorities in the Memphis Fire Department, especially in the higher ranks. A condition existed which plaintiffs believed violated Title VII, 42

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[6] See generally, Kinoy, The Constitutional Right of Negro Freedom, 21 Rutgers L.Rev. 387 (1967).

U.S.C. §§1981 and 1983. The consent decrees, which were entered in 1974 and 1980, were designed to remedy that underrepresentation.

When the Thirteenth Amendment is the context in which the statutes and the consent decrees are analyzed it is clear the consent decrees accomplished a result consistent with the mandates of the Thirteenth Amendment. By operation of the consent decrees, efforts were to be made to overcome ongoing exclusion of Blacks from the Memphis Fire Department to promote social and economic equality between minorities and whites in Memphis.

Amici assert this exclusion is fundamentally connected with slavery. Jones recognized that the Thirteenth Amendment is self-executing and that civil rights laws embody Justice Harlan's broad definition of the badges and incidents of slavery. Consequently, all forms of race

discrimination are subjected to the anti-discrimination commands of the Thirteenth Amendment. In this context, §703(h) of Title VII cannot deprive the Court of its equity jurisdiction to insure that this progress toward racial equality is not impeded.

Section 703(h) is but one section of Title VII which enumerates illegal employer union conduct. It allows employers and unions to treat employees differently so long as that different treatment is based on a bona fide seniority or merit system and further provided that the difference is not the result of intention to discriminate.

Congress recognized that if a bona fide seniority system was the basis for differential treatment, illegal discrimination could not be faulted for such differences. Congress also recognized that the purpose of

seniority is to secure fairness in the work place by reducing managerial preogatives, not simply to protect the expectations of senior workers. Securing such fairness is consistent with purposes of Title VII and consistent with the mandates of the Thirteenth Amendment.

In the present case, seniority-based layoffs act contrary to basic fairness. They perpetuate the historic cycle in which minorities and women are impacted first and worst; not only because they are last hired but also because as groups they lack power to influence the employer to seek alternatives to layoffs.

Petitioners have argued that because this case was settled (and thus no findings of illegal discrimination were made with respect to hiring, promotion or the genesis of the seniority system) §703(h) deprives the

Court of equitable authority to modify the seniority system so as to secure the status quo.

Section 703(h), which defines an exception to employer liability cannot be viewed as imposing a limitation to the Court's equitable remedial power. This is especially true where such limitation would require the Court to reverse the course originally agreed on by the parties so as to impede progress toward fulfilling the promise and the mandates of the Thirteenth Amendment. Such an interpretatior would move against the grain of the Constitution. See DPOA v. Young, 608 F.2d 671, 697 (6th Cir. 1979).

Thus, consistent with the fundamental objectives of fairness, a strict seniority system may be modified by the Court where it is done to eliminate the vestiges of racial discrimination.

This interpretation does not require the Court to overrule its interpretation of §703(h) articulated in Teamsters v. U.S., 431 U.S. 328 (1976). The Court instead should harmonize its holding in Teamsters with the mandates of the Thirteenth Amendment. This can be done by limiting the consequences of Teamsters. The Court must find that §703(h) does not nullify the Court's action to prevent an erosion of the progress made under the consent decree.[7]

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[7] In Teamsters, a Title VII case, the Court refused to invalidate a departmental seniority system which restricted the ability of minorities in the trucking industry to move from the lower-paid classifications to the higher ones. Finding that this "departmental" system predated minorities coming into the trucking industry, the Court refused to find that the separate lines of seniority for the different job classifications were negotiated with the intent to discriminate and thus §703(h) was not violated.

(Footnote Continued)

Congress was aware in 1964, when Title VII passed, of the conflict between seniority and the need to eliminate traditional patterns of inequality. The Thirteenth Amendment compels resolving this conflict in favor of eliminating the vestiges of slavery.

(Footnote Continued)

However, had the parties in Teamsters agreed and settled the case in a consent judgment which modified this seniority system for the explicit purpose of allowing minorities to move into the higher paying jobs, a court, consistent with the Thirteenth Amendment and this Court's opinion in Weber v. Kaiser Aluminum, 415 F.Supp. 761, aff'd 563 F.2d 216 (5th Cir. 1977), could not nullify that modification on the grounds that the prior system did not violate §703(h). See generally, E.E.O.C. v. A.T. & T., 419 F.Supp. 1022, aff'd 556 F.2d 167, cert denied, 438 U.S. 915 (1978). Similarly, if parties agreed to a proportional layoff procedure, such an agreement could not be invalidated under §703(h) even if the prior seniority system was arguably bona fide. See Tangren v. Wakenhunt, 658 F.2d 606 (9th Cir. 1981).

Petitioners argue that the Court's remedial jurisdiction is also limited by §706(g) to giving relief to only those adjudicated victims of discrimination. Such a narrow reading of Title VII would not only be inconsistent with the Thirteenth Amendment, it would be contrary to many previous decisions of this Court which have ruled on the issue. See cases cited in U.S. Commission on Civil Rights: Affirmative Action in the 1980's; Dismantling the Process of Discrimination, p.22 n.60 (1981).

Title VII, as part of the Civil Rights Act of 1964, was sweeping social legislation. It was passed in response to the reawakened civil rights movement which in turn was sparked by this Court's decision in Brown v. Board of Education, 347 U.S. 483 (1954).

The Act has two purposes only, one of which is to make victims whole. The other is

to provide a "spur or catalyst" to employers to change their discriminatory ways. See Albemarle v. Moody, 422 U.S. 405 (1975). Title VII would be totally ineffective if employers could not, through their voluntary compliance with the terms of Title VII, give remedies to persons who were not previously adjudicated to be victims of discrimination. Indeed, it is inconceivable that §706(g) could apply at all to a court's power to grant prospective relief[8].

This Court has refused in numerous Thirteenth Amendment cases to delimit the constitutional imperatives the Amendment has

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[8]This argument has been extensively made in a draft brief by the E.E.O.C. in Williams v. City of New Orleans, 694 F.2d 987 (5th Cir. 1982), en banc hearing ordered Feb. 14, 1983. See Bureau of National Affairs Special Report, Williams v. City of New Orleans, pp. 70-82.

been consistently held to contain. (See Jones v. Alfred H. Mayer Co., supra; Memphis v. Greene, 451 U.S. 100 (1981); General Contractors v. Pennsylvania, ___U.S.___, 102 S.Ct. 3141 (1982).

Amici do not urge resolving these issues in this case. Our position is that because the Amendment is self-executing, it automatically becomes the context within which civil rights legislation must be interpreted. Interpretations that perpetuate the badges and incidents of slavery must be avoided.

II. THE RECORD INDICATES THAT THE CITY OF MEMPHIS HAS FOLLOWED A PATTERN AND PRACTICE OF DISCRIMINATION AGAINST MINORITY FIREFIGHTERS

There is little dispute that the City's hiring policy, before the filing of lawsuits by the Department of Justice in 1974 and by respondent Stotts in 1977, was a particularly sordid one. As the Court of Appeals pointed out, between 1950 and 1976 the Memphis Fire

Department hired 1,777 firefighters, of whom only 94 were Black. 679 F.2d at 550 n.5. As late as the spring of 1981, Blacks constituted only 11% of the Memphis Fire Department while constituting approximately 35% of the population of the City of Memphis. Id. In light of this evidence the District Court was correct in concluding that prior discrimination by the City of Memphis was "obvious." Oral Ruling of the Court, May 8, 1981, App. to Pet. for Cert. at A76. That court went on to state in its order granting a preliminary injunction:

> While the consent decree entered in this matter does not admit racial discrimination on the part of the City, it would be naive of this Court not to believe that the fire department did not discriminate for a number of years in the past. Although this Court has made no findings of discrimination by the fire department, the Court takes judicial notice of past racial discrimination in the fire department based upon the statistical evidence presented in these cases.

Order Granting Preliminary Injunction, App. to Pet. for Cert. at A78. See also, App. to Pet. for Cert. at A73.

The District Court's decision to take judicial notice of the extent of discrimination, rather than require that it be proved, is specifically authorized by the Federal Rules of Evidence, Rule 201. That rule allows a district court to "accept as conclusive" facts "generally known" or "capable of accurate and ready determination." This Court has specifically upheld the taking of judicial notice of racial exclusionary practices in fields which have a long history of racial discrimination.[9] See

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[9]The extent of historic racial discrimination in the hiring of municipal firefighters is illustrated by the Statistical Comparison of Black and/or Hispanic Representation in Fire Departments and in Relevant Populations as Made by Federal Courts in Racial Discrimination Cases (Footnote Continued)

United Steelworkers v. Weber, 443 U.S. 193 (1979). In that case, the Court established the procedure followed by the District Court below: It looked at the imbalance between the racial composition of the plant's craft workers and the surrounding area and took judicial notice of Blacks' traditional exclusion from that trade. 442 U.S. at 108, 109 n.1.

A similar procedure was utilized by this Court in Northwest Airlines v. Transport Workers, 451 U.S. 77 (1981). The Court there stated: "We assume that the respondent unions in this case, as well as unions in other

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(Footnote Continued)
During the 1970's. This list was compiled by the Lawyers Committee for Civil Rights Under Law of the Boston Bar Association and was initially submitted to this Court in respondents' brief in Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP, ___ U.S. ___, 103 S.Ct. 2076 (1983).

industries, bear significant responsibility for discriminatory practices that these statutes [Title VII] were designed to prevent." 451 U.S. at 90 (emphasis supplied). A long line of cases has followed this Court's approach. See, e.g., Local Union No. 35, etc. v. City of Hartford, 625 F.2d 416, 422 (2d Cir. 1980); Terrell v. United States Pipe and Foundry Co., 644 F.2d 1112, 1119 (5th Cir. 1981); Detroit Police Officers Association v. Young, 608 F. 2d 671, 690 (6th Cir. 1979); South Florida Chapter, etc. v. Metropolitan Dade County, 552 F. Supp. 909, 926, n.13 (S.D. Fla. 1982).

The Sixth Circuit in this case acknowledged that the evidence presented was strong enough to justify taking judicial notice of past discrimination. That Court, however, buttressed its conclusion by finding that the evidence was also "strong enough to

create a strong prima facie case of racial discrimination." 679 F.2d at 555.

In Hazelwood School District v. United States, 433 U.S. 299 (1977), this Court held that "where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." 433 U.S. at 308, 309. And, in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), this Court pointed out that statistical proof of exclusion of minorities is often "a telltale sign of purposeful discrimination," and voiced its expectation that "claims of non-discriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." 431 U.S. at 340 n.20. The facts of this case

underscore the degree to which the City of Memphis failed to meet that standard.

In the face of overwhelming statistical proof and two law suits, one of which was filed by the United States Department of Justice, the City of Memphis quite sensibly negotiated a consent decree in which it promised to overcome this history of discrimination, and instituted a hiring program for minority workers. The decree was, in essence, the City's agreement to meet the standard enunicated in Teamsters. It stated that the City would "undertake the goal of achieving throughout the workforce proportions of minority and female employees in each job classification approximating their respective proportions in the civilian labor force." 679 F.2d at 547. J.A. at 101. Although the City did not explicitly admit that it had engaged in "misconduct," 679 F.2d

at 547, it conceded that the statistical showing that had been presented "may create an inference of racial and sexual discrimination." Id.

The consent decree represented a binding contract between the City and the minority workers and would be specifically enforcable as written. See United States v. I.T.T. Continental Baking Co., 420 U.S. 223 (1975). In Continental Baking this Court noted that "consent decrees and orders have attributes both of contracts and judicial decrees... While they are arrived at by negotiation between the parties and often admit no violation of law, they are motivated by threatened or pending litigation and must be approved by the Court or administrative agency." 420 U.S. at 236 n.10 (emphasis supplied). The Court thus recognized that it is often the case that parties to a decree do

not admit violations of law, but that the refusal to make such an admission has no bearing on the decree's enforceability as a contract. As with a contract, performance under the consent decree cannot be excused because of economic hardship. Neal Copper Grain Co v. Texas Gulf Sulpher Co., 508 F.2d 283 (7th Cir. 1974); J. Calamari and J. Perillo, Contracts, 491 (2d Ed.).

The decision of respondents to place their hopes in the legal enforceability of the consent decree was made at a great sacrifice of their rights. The decree stated that it "resolved all claims" of the respondents and required of the respondents that they "shall seek no further relief from the acts, practices or omissions alleged in the complaint save to enforce the provisions of the decree," thereby waiving further relief. It was thus absolutely essential for

the respondents to insure that the court retain jurisdiction of the action to effectuate the purposes of the decree.[10] Because the decree operates as a judicial act, United States v. International Continental Baking Co., 420 U.S. 223, 236 n.10, a court has "an affirmative duty to protect the integrity of its decree." Stotts, 679 F.2d at 557. It was with this in mind that the District Court enjoined the City's layoff plans.

The statistical impact of the City's contemplated layoffs underscored the need for the District Court to perform this function.

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[10]Cases have held that valid settlement agreements are "binding, final and as conclusive of rights as a judgment." Jones v. Texas Tech University, 656 F.2d 1137, 1142 n.2 (5th Cir. 1981); Thomas v. Louisiana, 534 F.2d 613, 615 (9th Cir. 1976); Clinton Street Greater Beth. Church v. Detroit, 484 F.2d 185, 189 (6th Cir. 1973).

As a group, the Black firefighters had accrued little seniority since the majority of them had been hired within the six-year period prior to the announced layoffs. As a result, it was estimated that nearly 60% of all firefighters affected by the demotions would have been minorities, and 46% of all minority firefighters would either have been laid off or demoted. 679 F.2d at 550. The Sixth Circuit concluded that the impact on minorities would have been "devastating," 679 F.2d at 546, and properly concluded that equitable relief was necessary.

III. THE DISTRICT COURT INJUNCTION WAS PROPER BECAUSE RESPONDENTS HAVE MADE A STRONG SHOWING THAT THE PROPOSED LAY OFFS WOULD VIOLATE TITLE VII AND THAT THEY WERE IRREPARABLY INJURED

The record indicates that the decision of the City of Memphis to lay off minority firefighters recently hired under the negotiated consent decrees targeted those

very workers, and was made without any consideration of available alternatives that would have allowed the City to accomplish its business purposes in a manner that did not have a discriminatory impact on minority workers[11]. Furthermore, the City did not provide the minority firefighters with an opportunity to put forth less discriminatory alternatives.

Petitioners argued that Section 703(h) and Temsters v. United States, 431 U.S. 324 (1977) insulate the decision to lay off employees because such lay offs were accomplished through a seniority system. In Teamasters, the seniority system was an

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[11] The Court of Appeals found that the City's unilateral decision to lay off recently hired minority firefighters was unnecessary in light of available alternatives. 697 F.2d at 561, 563.

employment practice that had to be addressed in order to adjust the rights of minority workers seeking to transfer from inferior jobs to that of line drive. In place and operating, the seniority system automatically came into play. In a situation in which an employer confronts and economic reversal, however, the operation of a seniority system is not inevitable. It becomes involved only if the employer chooses to respond to its economic crisis through layoffs. This independent decision is then implemented through the seniority-based reduction in force policy[12]. Amici contend that this

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[12] Professor Summers has advanced a similar distinction:

It is that prior decision--that some of the employees shall be given all of the available work while others are given none--that gives present effect to past

(Footnote Continued)

decision falls under Title VII disparate impact standard[13].

(Footnote Continued)
hiring discrimination.

> The ... question ... is whether, and within what limits, an employer can determine that available work will be distributed unequally among his employees rather than shared equally, when the unequal distribution perpetuates the effect of past discrimination.
>
> * * *
>
> When we focus on the antecedent decision to lay off, the question is whether the decision to reduce the number of employees was required by business necessity, or whether reducing the number of hours each employee worked would be a suitable alternative.

Summers and Love, Work Sharing as an Alternative to Layoffs by Seniority: Title VII Remedies in a Recession, 124 U.Pa.L.Rev. 893, 899, 918 (1976).

[13] Although not explicitly considered by the lower court the record also establishes that the city engaged in intentional discrimination in its decision to lay off employees. Petitioner City knew of the consent decree and that minorities had disporportionately low seniority status. By choosing to confront its economic problems

(Footnote Continued)

Since Griggs v. Duke Power Co., 401 U.S. 424 (1971), employment decisions that perpetuate the effects of past discrimination, even though neutral on their face and in their intent, are prima facie violations of Title VII. 401 U.S. at 430-432 (1971). In that case, this Court made clear that what was forbidden were "artifical, arbitrary, and unnecessary barriers to employment." 401 U.S. at 431. As the Court there pointed out, "the act proscribes not only overt discrimination but also practices that are fair in form, but

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(Footnote Continued)
through lay off rather than alternative employment practices, petitioner City must have intended the inevitable result -- the repudiation of the consent decree. See generally Detroit Police Officers Ass'n v. Young, 608 F.d 671, 692-3 (6th Cir. 1979). The lower court's failure to rule on this issue stems not from a lack of evidence but from its failure to distinguish the decision to lay off employees from the method for implementing that decision.

discriminatory in operation. The touchstone is business necessity." Id.

Following Griggs, a number of courts held that not only must a decision which has a discriminatory impact be justified by "business necessity," but that "there must be available, no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact." Robinson v. Lolliard, 444 F.2d 791, 798 (4th Cir.) cert., dismissed, 404 U.S. 1006 (1971). As the Court stated in Robinson:

> [T]he test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be

> available no acceptable alternative polices or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.

Virtually every jurisdiction has adopted this formulation of the test and applied it strictly. See Donnel v. General Motor Co., 576 F.2d 1292 (8th Cir. 1978); Kirby v. Colony Furniture Co., 613 F.2d 696 (9th Cir. 1980); Parson v. Kaiser Aluminum and Chemical Co, 575 F.2d 1374 (5th Cir. 1978); Muller v. United States Steel Co., 509 F.2d 923 (10th Cir. 1975); Palmer v. General Mills Co., 513 F. 2d 1040 (6th Cir. 1975): U.S. v. Bethlehem Steel, 446 F.2d 652 (2d Cir. 1971). In fact, the principal reason for rejecting most business justifications is a finding that there exist acceptable alternatives that have a less discriminatory impact. Belton, Title VII of the Civil Rights Act: A Decade of

Private Enforcement and Judicial Developments, 20 St. Louis L.Rev. 225, 256 (1976).

This Court has approved this analysis. In Albemarle Paper Co. v. Moody the Court stated that:

> [The employer] must meet the burden of showing that any given requirement [has].....a manifest relationship to the employment in question. If any employer does not meet the burden of proving that its tests are "job related" it remains open to the complaining party to show that other tests or selection devices without a similarly undesirable racial effect would also serve the employer's legitimate interest... Such a showing would be evidence that the employer was using it merely as a pretext for discrimination. 422 U.S. at 425 (emphasis supplied).

The applicability of these principles to the facts of this case is clear. The injury that the respondents were faced with in this case was the unilateral determination by the City of Memphis to adopt a layoff policy

which would clearly have a discriminatory impact on minority firefighters who had recently been hired under a negotiated consent decree. The racial impact of the layoffs on minority firefighters was sufficient to constitute a prima facie case of discrimination and simultaneously trigger a search for alternatives for dealing with the fiscal crisis that would have a less discriminatory impact. The Court of Appeals noted that the record indicated a number of alternatives that the City could have pursued that would have had a lesser racial impact. 679 F.2d at 548. Yet the City failed to consider any of these alternatives and furthermore refused to provide the minority firefighters with the opportunity to challenge the City's decision to lay off. Id.

At the preliminary injunction hearing Mayor Chandler and the City's personnel

director stated that the City did not consider possible alternatives. J.A. at 30, 44. The Mayor stated at the hearing that the 1981 lay-offs were the first that the City had experienced since previous budget crunches had been handled by a policy of attrition. A.J. at 36. However, at no point was it explained why a policy of attrition was not considered to solve the problem this time.

The City's refusal to consider alternatives was further compounded by its unwillingness to provide the minority firefighters the opportunity to suggest to the City alternative mechanisms for dealing with the financial crisis. The record reflects that even though the City was aware of the effect the lay-offs would have on minority firefighters, it refused to consult with them

before implementing its policy. See J.A. at 45.

Amici submit that consultation might have accomplished a resolution of the issues that are now before this Court[14]. Respondent minority firefighters were entitled to consult and suggest ways that the City could have accomplished its objectives short of outright layoffs.

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[14]There are a number of policies that the City could have followed that would have resulted in harms less grievious than outright lay-offs. Some of these alternatives include general tax increases, various forms of work sharing, and different political choices among the programs to which fiscal revenues are to be allocated. See generally, Burke and Chase, Resolving the Seniority/Minority Layoffs Conflict: An Employer Targeted Approach, 13 Harvard Civil Rights-Civil Liberties Law Review 81 (1981); Summers and Love, Work Sharing As An Alternative to Layoffs by Seniority: Title VII Remedies in a Recession, 124 U.Pa. L.Rev. 893 (1976); Blumrosen & Blumrosen, The Duty to Plan for Fair Employment Revisited: Work

(Footnote Continued)

This Court has established that in Title VII cases, those complaining of the racial impact of an employment decision must have the opportunity to question the employers' actions and offer alternatives. Albemarle Paper Co. v. Moody, 422 U.S. at 425; U.S. Postal Service Board of Governors v. Aikens, ___ U.S. ___, ___ 103 S.Ct. 1478, 1482 n.5; Texas Dept of Community Affairs v. Burdine, 450 U.S. 248, 255-256 (1981); Dothard v. Rawlinson, 433 U.S. 321, 329. See also, Bartholet, Application of Title VII to Jobs in High Places, 95 Harv. L. Rev. 947, 1023-1026 (1982). The failure of the City to provide minority firefighters with this opportunity in the face of layoffs was properly considered by the District Court and

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(Footnote Continued)
Sharing in Hard Times, 28 Rutgers Law Review 1082 (1975).

the Court of Appeals in their determination to enter the injunction.

The injunction was designed to prevent respondents from suffering clear irreparable injury. The minority firefighters had suffered a long history of discrimination at the behest of City officials in Memphis. The consent decrees provided them with the sole avenue of relief for the illegal actions of the City. They had waived all right to further litigation of the claims that were settled by the decree. The City itself implicitly admitted that these claims were strong. Yet it moved to undermine the decree by laying off the very people who the decree was designed to assist. In these circumstances, the attempt of the City to remove them from their jobs, depriving them of work experience, income, and personal dignity constituted irreparable injury subject to

alleviation by injunction. These injuries could not have been remedied through any means short of enjoining the City's contemplated lay-off plan. In essence, the Court below did what was necessary to remedy decades of discrimination by the Memphis Fire Department and fulfill the objectives of Title VII. Any other decision would have dealt a major blow to the hopes and promises that minorities and women have struggled to achieve throughout this country's history.

Although racial discrimination is still a persistent force in contemporary American life, Title VII and legal prohibitions of the various forms of employment discrimination have done much to bring minorities into the mainstream of the United States economy. See Freeman, Black Economic Progress After 1964: Who Has Gained and Why, in Studies in Labor Markets edited by Sherwin Rosen (University

of Chicago Press, 1981); Freeman, Changes in the Labor Market for Black Americans, 1948-1972, in Brookings Papers on Economic Activity 91-105 (1973); U.S. Commission on Civil Rights, Last Hired, First Fired, Layoffs and Civil Rights 7-14 (1977). Between 1964 (the year that Title VII took effect) and 1969 the median income of Black families rose by 32% and the unemployment rate for "Negroes and other races" dropped from 8.1% to 6.4%. Stacy, Title VII Seniority Remedies in a Time of Economic Downturn, 28 Vand. L. Rev. 487, 507 (1975).

A decision of this Court reversing the District Court and the Court of Appeals would certify to employers that Blacks and women, recent entrants into the mainstream economy because of past discrimination, can be dispensed with in hard times. Minorities and women would, "once again, as in World War II

be used as a reserve labor pool to be called upon only during emergency or prosperity[15]."

This Court's decision should be one which will ensure that in all possible instances, employers not resolve financial crises in ways which pit against each other the goals of minority equal employment opportunity and principles of seniority, and more importantly, in ways that pit the interests of white male workers against the interests of minorities and women. In this case the City of Memphis has carelessly engendered this conflict for the purpose of eliminating a short term fiscal crisis.[16]

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[15] Blumrosen & Blumrosen, The Duty to Plan for Fair Employment Revisited: Work Sharing in Hard Times, 28 Rutgers Law Review 1082, 1085 (1975).

[16] The City has also, by its unilateral determination to lay-off minorities, sought

(Footnote Continued)

The City has brought on such a collision without giving consideration to the many possible ways that the conflict could have been avoided. In cases such as the one at bar, public anti-discrimination policy requires employers to consider all possible alternatives to layoffs based on seniority and consult with all persons facing layoffs to ascertain whether there are means and methods for handling the situation which do not undermine the concerns embodied in Title VII.

This Court has repeatedly expressed its concern that "childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their

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(Footnote Continued)
to undermine a negotiated consent decree which, if continued would provide real and lasting benefits to minority workers.

control, not be allowed to work cumulative and invidious burden on such citizens for the remainder of their lives." Griggs, 401 at 430, McDonnell Douglas Corporation v. Green, 411 U.S. 792, 806,(1973). Amici submit that these were also the motivating concerns of the courts below. Had the City been allowed to carry through its layoff policy, Blacks in Memphis would have been in nearly the same position with respect to employment as firefighters as they were in the 1950's, and without any possibility of seeking legal redress since they had placed all of their hopes in the consent decrees. Memphis would have been added to that long list of cities where "minorities represented only 10 to 12 percent of the work force (but) accounted for 60 to 70% of those being laid off..." U.S. Commission on Civil Rights, Last Hired First

Fired: Layoffs and Civil Rights 24-25 (1977).

IV. CONCLUSION

For all of these reasons the decision of the lower court should be affirmed.

Respectfully submitted

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Center for Constitutional Rights; and Linda Fullerton of Richmond, California.

APPENDIX A

Statistical Comparison of Black and/or Hispanic Representation in Fire Departments and in Relevant Populations

Made by Federal Courts in Employment Discrimination Cases During the 1970's

Political Subdivision	Minority Percentage in Fire Department	Minority Percentage In Population
1. Baton Rouge,LA	2%	27%
2. Baltimore,MD	13.7%	47%
3. Boston,MA	.9%	23%
4. Bridgeport,CT	.2%	41%
5. Buffalo,NY	1.2%	24.3%
6. Columbus,OH	2.31%	18.3%
7. Detroit,MI	7.5%	50%
8. Jacksonville,FL	12%	--
9. Los Angeles,CA	3.3%	29.1%
10. Memphis,TN	10%	33-37%
11. Minneapolis,MN	.3%	6.44%
12. New York,NY	5.6%	32%
13. Pittsburgh,PA	3.9%	20%
14. San Francisco,CA	.2%	43%
15. St. Louis,MO	11%	40%
16. St. Paul,MN	1.3-2%	8%
17. St. Petersburg,FL	3.9%	14.75%
18. Santa Ana,CA	4.5%	25.8%
19. Toledo,OH	1.8%	16%
20. Westchester County,		
NY-New Rochelle	3.9%	16.1%
Mt. Vernon	3.1%	36%
White Plains	3.4%	15.4%

Source of Data

1. United States v. City of Alexandria, 614 F.2d 1358, 1360 (5th Cir. 1980)
2. Harper v. Mayor and City Council of Baltimore, 359 F.Supp. 1187, 1193 (D.Md.), aff'd in part and modified in part sub nom. Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973)
3. Boston Chapter NAACP, Inc. v. Beecher, 371 F.Supp 507, 514 (D.Mass.), aff'd 504 F.2d 1017 (1st Cir. 1974) cert. denied, 421 U.S. 910 (1975)
4. Ass'n Against Discrimination v. City of Bridgeport, 647 F.2d 256, 265 (2d Cir. 1981), cert. denied, 455 U.S. 988, (1982)
5. United States v. City of Buffalo, 457 F.Supp. 612, 621 (W.D.N.Y. 1978), aff'd, 633 F.2d 643 (2d Cir. 1980)
6. Dozier v. Chupka, 395 F.Supp. 836, 840 (S.D. Ohio 1975)
7. Van Aken v. Young, 541 F.Supp. 448, 460 (E.D. Mich. 1982)
8. Corley v. City of Jacksonville, 506 F.Supp. 528, 530 (M.D. Fla. 1981)
9. Davis v. County of Los Angeles, 566 F.2d 1334, 1337 (9th Cir. 1977), vacated as moot, 440 U.S. 625 (1979)
10. Stotts v. Memphis Fire Department,679 F.2d 541, 550 (6th Cir. 1982) cert granted ___U.S.___, 103 S.Ct. 2451 (1983)
11. Carter v. Gallagher, 452 F.2d 315, 323, modified on rehearing en banc 452 F.2d 327, 328 (8th Cir.), cert. denied, 406 U.S. 950 (1972)
12. Vulcan Society of the New York City Fire Department, Inc. v. Civil Service

Commm'n of the City of New York, 490 F.2d 387, 398 (2d Cir. 1973)

13. Commonwealth of Pennsylvania v. Glickman, 370 F.Supp. 724, 729 (W.D.PA. 1974)
14. Western Addition Community Organization v. Alioto, 369 F.Supp. 77, 79 (N.D. Cal. 1973), appeal dismissed as moot, 514 F.2d 524 (9th Cir. 1975), cert. denied, 423 U.S. 1014 (1975)
15. Firefighters Institute for Racial Equality v. City of St. Louis, Missouri, 616 F.2d 350, 363 (9th Cir. 1980), cert. denied, 452 U.S. 938 (1981)
16. Fowler v. Schwarzwalder, 351 F.Supp. 721, 723 (D.Minn. 1972)
17. League of United Latin American Citizens v. City of Santa Ana, 410 F.Supp. 873, 879 (C.D.Cal. 1976)
19. Brown v. Neeb, 644 F.2d 551, 555 (6th Cir. 1981)
20. Vulcan Society of Westchester County, Inc. v. Fire Department of White Plains, 505 F.Supp. 955, 958 (S.D.N.Y. 1981)

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APPENDIX

AMICI STATEMENTS OF INTEREST

The AFFIRMATIVE ACTION COORDINATING CENTER (AACC) is an organization created by the National Conference of Black Lawyers (NCBL), the Center for Constitutional Rights (CCR) and the National Lawyers Guild, (NLG), with the participation of a cooperating network of civil rights, civil liberties, and other organizations. Many network organizations, as well as other groups, have joined as amici in this brief.

The AACC was formed in response to the proliferation of attacks on affirmative actions programs. Its purposes are to stimulate and coordinate resources and legal strategies for the defense and expansion of affirmative action programs. The AACC has convened roundtables of civil rights,

labor and women's rights attorneys to discuss the WEBER, BAKKE, FULLILOVE, and WHITE cases.

AACC publishes an informational newsletter entitled AACC News. It is preparing several plain language publications on affirmative action in education and employment. The AACC has conducted and is planning other activities designed to increase communications and enhance joint efforts by all groups and individuals interested in strengthening effective affirmative action programs.

The NATIONAL CONFERENCE OF BLACK LAWYERS (NCBL) is an activist legal organization of Black lawyers, law professors, judges and law students dedicated to serving as the legal arm of the Black community. Since its inception in 1968, NCBL has been actively involved in the continuing struggle for equal employment opportunity. Over the past five years, NCBL has led the struggle for the full implementation of the principles of affirmative action that have been affirmed by the Congress and the Courts. We are intimately concerned about how the operation of the last-hired, first-fired principle, if applied in this case, would disproportionately affect our constituency. Therefore, we urge this Court to find the modifications of the consent decree in this case to be a valid expression of the National

mandate against race discrimination.

The NATIONAL LAWYERS GUILD (NLG) was founded in 1937 as a multi-racial and progressive alternative to the racially restrictive, conservative American Bar Association. Its commitment to civil rights dates back to efforts to eliminate the poll tax and white primaries. In 1962, the Guild dedicated its full resources to the legal support of the civil rights movement. In support of affirmative action, the Guild filed briefs in every affirmative action case since Bakke. The Guild standing committees, Affirmative Action/Anti-Discrimination and the National Committee to Combat Women's Oppression, have specifically considered and adopted the position advocated herein.

The CENTER FOR CONSTITUTIONAL RIGHTS (CCR) was born of the civil rights movement and the struggles of Black people in the United States for true equality. CCR attorneys have been active in cases involving voting rights, jury composition, community control of schools, fair housing and employment discrimination. Through litigation and public education, they have worked to protect and make meaningful the constitutional and statutory rights of women, Blacks, Puerto Ricans, Native Americans and Chicanos.

The ALL-PEOPLES CONGRESS has, since its inception, made the struggle against racism and bigotry a priority in all of its initiatives. The All-Peoples Congress was born in Detroit where 3,000 grassroot organizers - Black, Latin, Asian, Native Indian and White gathered to plot strategies to fight Reagan's racist, sexist, anti-people budget cuts. A leading member of the All-Peoples Congress, Larry Holmes, was a co-coordinator of the NY Committee to overturn the Bakke decision. He also wrote a pamphlet entitled "Weber is Wrong, the United Steelworkers are Right: The Case for Affirmative Action." The All-Peoples Congress has been a participant in the struggle for affirmative action in Local 26 of the Hotel and Restaraunt Employees Union, in the United Steelworkers of America, and in Local 8751 representing the Boston school bus

drivers. The All-Peoples Congress supports the holding of the court below.

THE ASIAN LAW CAUCUS, INC., is a community-based law office serving the Bay Area Asian community. Established in 1972, we handle cases in the areas of employment/labor, immigration, and general civil rights. We have worked with the Asian-American Legal Defense and Education Fund very closely for the past five years, and are active in the National Lawyers' Guild.

We support the arguments put forth in the AACC brief asking the court to maintain strong affirmative action programs when findings of racial discrimination have been made. In the long run, it is in the interest of all workers to support anti-racist measures which attempt to remedy the injustices of past and current discrimination.

Although seniority is an important tool to protect against arbitrary actions by employers, we recognize that

seniority, when combined with racist policies, perpetuates discrimination and locks generations of minorities out of key sectors of employment.

We note that there is historic violence and harassment perpetrated by police departments upon Asian and other minority communities nationwide. Although we believe that an integrated police force will not resolve this situation, we would support all efforts to gain affirmative action in public and private employment.

The ASSOCIATION OF OREGON BLACK LAWYERS was founded in 1978. Our purpose is to increase the number of Black Lawyers in the State of Oregon. To fulfill this objective, we encourage young Black students to pursue legal education. Through various fund raising activities we have been able to generate funds for scholarships for Black law students enrolled in Oregon law schools.

The Association for Oregon Black Lawyers represents the majority of Black lawyers in the State of Oregon. Our members feel strongly that affirmative action initiatives such as the one invoked by the court below in the Stotts v. Memphis Fire Department ruling are essential to reaching full equality in employment opportunities. We believe that economic cutbacks do not provide sufficient justification

for reversal of the progress towards equal opportunity in employment, and we fully support continued enforcement of the original consent decree.

BLACK EDUCATORS' ALLIANCE OF MASSACHUSETTS, was created for the purpose of advocating and lobbying for the interests of minority administrators, teachers, parents and students in Massachusetts. The Alliance, previously the Negro Teachers' Association, was founded during the mid-sixties in response to the lack of representation of minority issues in the teachers' unions and school committees. Its major goal is to advocate quality education and affirmative action. The Alliance represents several hundred Black teachers and administrators, and is an associate member of the New England Black Educators' Association. The Alliance, which faced similar attacks in the education sector, supports the holding of the court below.

BLACK WOMEN FOR POLICY ACTION is a Boston area organization which has as one of its mandates securing jobs for minorities in all sectors of the economy. Since 1977 it has been active in local politics to ensure access for women and minorities in the mainstream. We, wholeheartedly, support the efforts being made to protect gains made by minorities in obtaining work through affirmative action efforts.

BOSTON MOBILIZATION FOR SURVIVAL is a political organization bringing together individuals interested in nuclear disarmament, economic justice, social equality, and political freedom. Through public education and political action, we seek to create positive social change. We work toward a world free of economic exploitation of national minorities, and institutions which perpetuate racism, sexism, and other forms of discrimination. Our organization supports the holding of the court below.

The CHINESE-AMERICAN CITIZENS ALLIANCE was founded in 1895. We are concerned with all issues affecting Asians and other minorities in this country. We are especially dedicated to changing the unfair immigration laws that affect our minority populations.

Chinese-American Citizens Alliance has 15 chapters throughout the United States and over 2,000 prominent members.

The COUNCIL OF MINORITY EDUCATORS IN MASSACHUSETTS PUBLIC COLLEGES AND UNIVERSITIES is an organization of minority faculty and staff representing the twenty-nine state supported campuses in Massachusetts. The purpose of the organization is to provide a network to keep minorities abreast of issues affecting them and minority students.

The organization is supportive of affirmative action programs and believe they must be upheld even during times of fiscal constraint. For this reason the Council is pleased to join in support of this brief.

EDUCATORS UNITED is a multi-racial organization of teachers and aides who work in the Milwaukee Public School System. Our purpose is to work for equal and quality public education.

We strongly believe that our government must ensure equality for minorities in the workplace through preferential treatment in hiring and layoffs. This is the only way past vestiges of discrimination will be eradicated and minority represenation in the public workforce raised to a level that reflects the composition of the constituencies that are being served.

ESPERANZA UNIDA is a non-profit social service and educational community organization which serves injured and unemployed workers. The majority of the people we serve are spanish-speaking. Our organization has over 500 members and gives services to between 500 and 750 people per month. One of the primary concerns of our work is to return the injured and unemployed people we serve to the job market. We experience everyday the effects of discrimination in this job market. The use of affirmative action has done much to give hope to our community. Any erosion of this principal, which is intended to correct the effects of discrimination, would be devastating to us. We also believe that the principal of equal participation of all people in the job opportunities of our communities is essential

to stability. The preservation of this principal must be considered as more valuable to our society than the principles with which it conflicts. Without the continued use and support of affirmative plans the idea of equality has no meaning to us.

The GRAY PANTHERS were founded in the early 1970's as a direct outgrowth of the Anti Vietnam War movement and in opposition to the draft, one of the worst ageist institutions in our society. We are an advocacy organization currently dealing with issues of ageism and its effects upon the older and younger citizens of this country.

We are presently involved in advocating around problems of housing, health care, job discrimination, forced retirement, transportation, education, Social Security cutbacks, Medicare cutbacks and issues around nuclear disarmament, peace and U.S. policy in Central America and elsewhere. We work in coalition with other groups working with the same problems. We represent the nearly 25 million older members of this society over the age of 65 and struggling with the problems listed.

Our goal is to reconcile the disparate elements of this society and to create a more equal distribution of the benefits based upon human needs and not upon criteria that tend to separate people, such as race, age, sex, national origin. The Gray Panthers strongly support the decisions of the United States District Court and the United States Court of Appeals for the Sixth Circuit.

LA ALIANZA LEGAL DE OREGON (LALO), the association for hispanic attorneys and law students of Oregon was founded to advocate for the legal, political, and employment rights of hispanics. LALO has been involved in advocating for increased minority representation in the legal profession, assisting in career days, providing legal assistance to hispanic community groups, assisting with voter registration and naturalization, monitoring and lobbying on legislation affecting the hispanic community, and monitoring employment of hispanics in the legal profession.

Possessing knowledge of the hispanic community both from a personal viewpoint and from involvement in the community, LALO members are in a good position to assess the effects of legal decisions on that community. LALO opposes allowing union seniority to

wipe-out gains achieved by minorities under affirmative action and urges that the decision of the 6th Circuit in Stotts be affirmed.

LA CASA LEGAL is a chicano law firm with four attorneys located in San Jose, California. Since ninety percent of our clientele is mexican-american, we are familiar with the attitudes of the local chicano community on the issues raised by cases such as Stotts v. Memphis Fire Department. There is no question but that the vast majority of the community we serve would not regard economic cutbacks as sufficient justification to depart from the affirmative action goals reflected in the original Consent Decree. For this reason, we urge you to affirm the decision of the court below.

LA RAZA CENTRAL LEGAL was established for the purpose of providing civil legal representation to low and moderate income spanish-speaking persons. The Community Law Center was founded in 1973 in response to the private Bar's inability to provide adequate counsel to non-english speaking persons facing a variety of serious legal problems, ranging from employment discrimination to wrongful eviction.

The organization represents the hispanic community, many of whose members were hired under affirmative action plans. Because many of these employees would face increased risk of lay-off or demotion if the position of the City of Memphis is upheld, La Raza Central Legal supports the injunctive relief ordered by the U.S. District Court.

The LEAGUE OF MARTIN is a nonprofit organization incorporated in 1974. Members of the League of Martin have been Milwaukee police officers and the organization's primary concern is racial discrimination within the Milwaukee Police Department. The League of Martin has undertaken numerous activities to eliminate discriminatory employment practices of the City of Milwaukee Police Department including filing of charges of discrimination with the United States Equal Employment Opportunity Commission and litigation.

With respect to litigation, the League of Martin and individual black Milwaukee police officers are plaintiffs in a certified class action, League of Martin, et al., v. City of Milwaukee, et al., 81-C-1464, pending in the United States District Court of the Eastern District of Wisconsin. The League of

Martin has also protested unlawful race discrimination in complaints to the Office of Revenue Sharing of the United States Treasury Department.

The League of Martin has consistently acted upon its belief that race discrimination is harmful not only to the victims of the discrimination but also to the legitimate objectives of professional, competent, and fair law enforcement. The League of Martin encourages and supports the use of affirmative action plans to correct the effects of past discrimination.

MASSACHUSETTS CITIZENS AGAINST THE DEATH PENALTY is a coalition of five thousand individuals and organizations who have opposed the restoration and implementation of the death penalty in Massachusetts for the last two years. The race discrimination which permeates the imposition of the death sentence has been judicially recognized by the Massachusetts Supreme Judicial Court in Watson v. District Attorney, 1980 Mass. Adv.Sh. 2231 (1980), and by this Court in Furman v. Georgia, 408 US 238 (1972). Our entire campaign against such racism documents our support for the affirmative action remedy necessary for the Memphis Fire Department.

The MASSACHUSETTS STATE DIVISION, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN was organized more than 100 years ago to advance opportunities for women. Today more than 190,000 college-educated women across the country comprise the membership of this Association.

As part of this network, the Massachusetts State Division supports the concept of affirmative action as a vehicle to open areas of employment for women and minorities, and to create equity in the workplace. We oppose lay-off policies which will weaken and/or negate advances made through affirmative action programs.

The Massachusetts State Division of the AAUW strongly supports the holding of the court below.

The MINORITY LAW STUDENTS' ASSOCIATION (MLSA) of Lewis & Clark Law School is a group of law students whose purpose is to increase the number of minority students at the Law School and to advance the interests of minorities in general. As a group, MLSA benefits from affirmative action programs and we think that a layoff policy based solely on seniority would clearly discriminate as to minority workers.

There should be more equitable guidelines to determine the order of layoffs. A decision supporting layoff of workers by order of seniority would only serve to eliminate the equality of treatment that affirmative action has so far achieved throughout the nation.

The NATIONAL ANTI RACIST ORGANIZING COMMITTEE (NAROC) is a multi-racial, community based organization headquarted in Oakland, California,with chapters and affiliates in New York, Washington, D.C., Boston, San Francisco Bay Area, Los Angles, Seattle, Miami, Chicago, Louisville, and Fresno, California. Our work is dedicated to eliminating the system of racial inequality and achieving full equality for all in the political, economic, social, and cultural life of the United States.

NAROC grew out of the massive effort to overturn the Bakke decision during its consideration by the U.S. Supreme Court in 1977. We continue to see the defense and expansion of affirmative action as a national priority, as it is important to assure that business and government take concrete steps toward the elimination of institutionalized

racism in employment.

NAROC appears as an amici because Stotts v. Memphis Fire Department represents a serious challenge to affirmative action programs necessary to abolish the patterns and practices of institutionalized discrimination which have historically excluded people of color and women from equal employment opportunities. We affirm respondent's contention that plaintiff's complaint is now moot. If the issues are reached, we maintain that, while seniority is an important tool against arbitrary actions by employers, seniority systems can also perpetuate segregated employment patterns. For this reason, we support a modification of the seniority system for layoff from the Memphis Fire Department ordered below.

The NATIONAL COMMITTEE TO COMBAT WOMEN'S OPPRESSION (NCCWO) of the National Lawyer's Guild was established to provide a women's focus for Guild work in various areas of its involvment, including employment, education, and economics. Since its inception in 1975, NCCWO has furthered this goal by coordinating the work of local and national group efforts to end sexism, and educating the Guild membership and the public on issues of importance to women. NCCWO recognizes the necessity to maintain strong affirmative action programs in order to remedy employment discrimination against minorities and women. Our organization, therefore, supports the holding of the court below.

NEW ENGLAND MINORITY WOMEN IN BUSINESS is an organization of fifty minority women who own their own businesses and who are interested in entrepreneurship as a viable career alternative. We are concerned with the economic development of the Black Community and feel that entrepreneurship and higher paying jobs like civil service jobs have been closed to the minority community. We support the right of Black people to economically maintain their families and community.

THE PARISH COUNCIL OF HOLY ANGELS CATHOLIC CHURCH at 3970 N. 12th Street, Milwaukee, is organized as the elected governing body of parish concerns. As a Church ministering to the needs the people of inner city Milwaukee, especially minorities, a chief concern has been the injustice to which minorities have been subjected. Affirmative action policies are one remedy for past exclusion from employment opportunities. Therefore, the Parish Council is very interested in the case of Stotts v. Memphis Fire Department. The council sincerely hopes that efforts to create justice in the workplace will not be reversed.

The VULCAN PIONEERS OF NEW JERSEY OF NEWARK, N.J. is an organization composed of minority firefighters formed in 1957. Our major purpose and goal is to promote interracial progress in the fire service and to see that competent blacks are recruited and employed as firefighters, and also to aid in motivating our members to seek advancement to elevated ranks throughout the fire service. The Vulcan Pioneers of N.J. support the holding of the lower courts.

The WILLAMETTE VALLEY IMMIGRATION PROJECT, founded in 1977, serves the Willamette Valley's Mexican community, centered in Woodburn, Oregon, in legal matters relating to immigration and political work on issues of broad concern to the Mexican community such as discrimination and equal justice. Many of those affirmative action benefits at stake in the Stotts case have yet to reach this community. Both our organization and the community we serve support the protection and strengthening of such benefits, especially in hard economic times.

The WOMEN'S BAR ASSOCIATION OF MASSACHUSETTS (WBA) is a state-wide organization of approximately 500 women attorneys committed to improving the status of women both inside and outside the legal community. The WBA is involved in issues of interest to women and to women lawyers. The WBA is particularly interested in ensuring that women and minorities receive the full protections of anti-discrimination laws, and that those laws be interpreted broadly to afford adequate protections.

THE WOMEN'S COALITION, INC. is an umbrella organization of thirteen women's organizations in Milwaukee, Wisconsin. The Coalition was established in 1972 to meet the needs of Milwaukee area women through organizing, establishing services, providing a meeting place for women, and creating a centralized information and referral service. Among its activities has been sponsoring annual "Take Back the Night" demonstrations and activities related to the problem of sexual assault and violence against women, and thousands of persons have participated in these actions locally.

The Women's Coalition has always been committed to advocating equal rights and access by minorities and women in American society. The coalition also perceives there to be a substantial problem in Milwaukee regard-

ing police community relations, and believes affirmative action in hiring and retention of minorities and women to be an essential element of ameliorating such problems.

WOMEN FOR ECONOMIC JUSTICE, INC. was established by former members of the Massachusetts Governor's Commission on the Status of Women to publicize and ameliorate the economic problems which affect women in our economy. Toward that end we have instituted economic literacy programs around the state providing information to other women's groups. As part of that program we help women understand the relationship between economic status and racism and have held conferences on the issue of pay equity. A primary objective of our organization is the furtherance of affirmative action for women and third world people and the elimination of all forms of employment discrimination. We believe that the ability of the Court to maintain during a layoff the progress made in hiring minority

fire fighters is crucial to an ultimate end to racial discrimination.

The WOMEN'S JOB COUNSELING CENTER, formed in 1979, exists to help women who have fallen between the cracks to obtain employment that has a future. We test women for job skills and counsel them. We also train women in developing skills which will help them obtain employment. We support the plaintiffs in this suit becasue we know that minorities and women face similar problems in the workplace, that must be remedied by increased affirmative action measures.

TION FILED
AUG 19 1983

Nos. 82-206 and 82-229

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FIREFIGHTERS LOCAL UNION No. 1784,
Petitioner,

v.

CARL W. STOTTS, ET AL.,
Respondents.

MEMPHIS FIRE DEPARTMENT, ET AL.,
Petitioners,

v.

CARL W. STOTTS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO, FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The American Federal of Labor and Congress of Industrial Organizations (AFL-CIO) and the Public Employee Department, AFL-CIO (PED), respectfully move this Court for leave to file the accompanying brief as *amici curiae* in support of the position of the petitioners in these consolidated cases.

INTEREST OF THE AMICI CURIAE AND ISSUES TO BE COVERED IN THE BRIEF AMICI CURIAE

The AFL-CIO is a federation of 97 national and international unions having a total membership of approximately 13,500,000 working men and women. The PED is composed of 30 of the AFL-CIO's affiliated unions having a total membership of 2,000,000 public employees.

The AFL-CIO and PED have consistently championed the rights of victims of discrimination to be made whole for the injuries caused thereby. The AFL-CIO's position in that respect is reflected by its joint brief with the United Steelworkers of American in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, advocating the result that this Court reached therein. But that is not the relief that has been awarded below. Instead, the lower courts have imposed a quota under which employees of one race who have committed no wrong and whose seniority entitles them to their jobs will be displaced by employees of another race who are *not* the victims of any discrimination and whose seniority does not entitle them to those jobs.

The AFL-CIO has also consistently championed the rights of *private parties* to adopt, if they choose to do so, racial quotas in employment in appropriate circumstances. The AFL-CIO's position in that respect is reflected by its joint brief with the United Steelworkers of America in *Steelworkers* v. *Weber*, 443 U.S. 193, advocating the result that this Court reached therein. But the instant case involves no privately adopted quotas, but rather quotas imposed by courts as ostensible remedies

for discrimination allegedly violative of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e and 42 U.S.C. §§ 1981 and 1983.

The legal principles espoused by the courts below would, if embraced by this Court, jeopardize collectively-bargained seniority systems throughout America. The interest of movants in protecting those systems prompts the filing of this brief to address the fundamental issue whether the courts' remedial power includes displacing, on the basis of race, innocent employees from the jobs their seniority has gained them, in order to make room for junior persons of another race *who have not been the victims of the discrimination alleged in the lawsuit.*

CONCLUSION

For the above-stated reasons, this motion for leave to file an *amicus curiae* brief should be granted.

Respectfully submitted,

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

This brief *amici curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amici curiae* in this case is set forth in that motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

At the threshold of this case are two issues of more than passing significance: first, whether a court may, in the absence of any adjudication of liability, modify a consent decree by adding a type of relief—here an injunctive order that layoffs be governed by racial quotas rather than by the seniority rules that otherwise would have obtained—to which the defendants (collectively, the employer) have never agreed; second, whether the plaintiffs and the employer, again in the absence of any adjudication of liability, may abrogate contractual obligations that the employer owes to the union representing the employer's employees by agreeing, without the union's consent, to entry of a consent decree that purports to override the union's contractual rights. We address these issues only in the margin because we understand the first is being addressed by petitioners, who are better positioned than we to elucidate the meaning of the consent decree, and because the second turns on a state law question not decided below and thus is not ripe for decision in this Court.[1]

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[1] Under the "four-corners of the decree" test of *United States* v. *Armour & Co.*, 402 U.S. 673, 681-682 (1971), it cannot be found that the parties in this case actually agreed to the use of a racial quota for determining the order of layoffs. The courts below did not purport to find such an agreement, but instead concluded that the district court had power to *modify* the consent decree to achieve that result. Nor did the courts below determine in light of changed circumstances to reopen a case purportedly settled by a consent

We concentrate instead on a third issue respecting the propriety of the district court's order as modified: whether the order in its substance exceeds the proper bounds of an equitable decree. In examining that issue, we treat the order here as if that order had been

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decree, to adjudicate the original allegations of wrongdoing, and if violations were found to modify the decree to impose additional remedies. In this instance, rather, despite the defendants' express disclaimer in the consent decree that they had committed any violations, and without any adjudication that they had, the courts below held that the modification providing additional relief to the plaintiffs could be made. That action would be permissible, we submit, only if the original consent decree could be construed within its "four corners" to contain the defendants' consent to the district court making so sweeping a modification of the decree as entered. See *Fox* v. *United States Dept. of Housing*, 680 F.2d 315 (3rd Cir. 1982). We believe that the original consent decree is not susceptible to that construction.

If the original consent decree *were* susceptible to that construction, it would follow that the employer had "consented" to the judicial elimination *pro tanto* of whatever seniority rights were enjoyed by employees under the collective agreement between the union and the employer. The court below did not decide, but merely assumed *arguendo*, that under Tennessee law the collective agreement is legally enforceable. (Union Pet. App. A 38 and n.20). *If* the collective agreement created legally enforceable seniority rights, the question would be posed whether a district court is empowered, with the "consent" of the employer and the plaintiffs, but without an adjudication that the employer has violated any law, to enter an order that abrogates contractual seniority rights enjoyed by employees pursuant to a collective agreement negotiated by their union (neither the affected employees nor their union having consented to the abrogation). That issue was debated by the litigants, but not reached or decided by this Court, in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385. Our position on that issue—that A and B cannot contract away C's rights, nor "consent" to a court's abrogating those rights—is fully stated in the brief we filed in *Zipes*. Brief for the AFL-CIO in No. 80-951. See also Brief for Petitioner in No. 80-951, pp. 35-37; Reply Brief for Petitioner in No. 80-951, pp. 1-6. This Court's later decision in *W.R. Grace and Co.* v. *Local Union 759, Rubber Workers*, —— U.S. ——, 51 L.W. 4643, 4647 (May 31, 1983), holding that a concilitation agreement between an employer and the EEOC cannot override contractual seniority rights absent the union's consent, lends additional support to the thesis stated in these briefs.

founded on an adjudication of liability, rather than on consent by the plaintiffs and the employer. Our approach avoids the question whether a court has less power to enter a decree drawn on racial grounds when its remedial authority is founded, as here, solely on the supposed consent of the parties to the litigation, than when its remedial authority is founded on adjudicated violations. Our approach assumes, of course, that courts do not, by reason of a consent, have *more* power to grant this remedy than the judiciary possesses upon an adjudication that violations have occurred. That assumption, we believe, cannot be seriously disputed: whatever might be the power of a court to approve a consent decree inflicting injury *upon the defendant alone* that the court could not have inflicted upon an unwilling defendant following adjudication of liability (*cf. United States* v. *Swift & Co.*, 286 U.S. 106, 116-117), it must surely be the law that a remedy that a court is powerless to enter against a defendant *because its impact upon innocent third parties renders that remedy inequitable* is one that a court has no greater power to enter simply because the defendant is prepared to consent to the infliction of that inequity upon others.

On these premises, the issue that we address here may be stated as follows: whether in an employment discrimination case a court may order that employees of one race who have done no wrong be deprived of their jobs to open those positions to persons of another race *who were not the victims of any unlawful employment practice of the defendants.*[2] In more concrete terms, the

[2] There is no dispute in this case that (a) but for the order at issue here the layoffs in question would have been made on the basis of seniority, and (b) the beneficiaries of the order at issue include persons who were not victims of the discrimination alleged in the complaint. The district court's order requires that seniority *not* be applied "where it will decrease the percentage of black lieutenants, drivers, inspectors and privates that are presently employed in the Memphis Fire Department." Union's Pet. App. A78. Thus, white employees, who by seniority would not have been laid off, were

question is whether, consistent with the principles of equity, the provisions of the applicable federal statutes, and the constitutional limits on race-conscious action by government, a court order may force employees to yield their jobs, solely because of their race, to persons of another race who have not been deprived of those jobs by reason of discrimination. This question is one of the utmost sensitivity and has never before been addressed by the Court.

The answer to this question, we believe, emerges from several distinct considerations, all of which point to the conclusion that the courts are without authority to remedy a violation by adopting quotas that, on the basis of race, displace innocent employees of one race from their jobs to make room for persons of another race who were not victims of that violation. As we discuss more fully herein:

1. The commands alleged to have been violated here—Title VII, 42 U.S.C. § 1981, and the Fourteenth Amendment—all protect individuals from discrimination; none directs a racial balance in employment. The judicial authority to remedy violations of those commands is coincident with the protections conferred: victims of such violations are to be made whole; no remedies are appropriate for nonvictims.

2. The quota remedy entered below does not conform to this remedial scheme: that remedy extends affirmative

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as a result of the court's order laid off in lieu of black employees, so that the percentage of blacks in the Department could be maintained. There is no allegation or evidence that the blacks who were able to avoid being laid off as a result of the order were themselves victims of prior hiring discrimination by the Department. This is not to say that there might not be among those who benefit from the quota some who coincidentally were victims of prior discrimination, but only that the class of beneficiaries of the quotas is not defined as, nor confined to, prior victims, nor is its effect—even when coincidentally benefiting a prior victim—to restore that victim to his or her rightful place.

relief to persons who were not victims of the discrimination alleged and who thus are, without the benefit of any court order, already in "the position they would have occupied in the absence of [defendants' discriminatory] conduct." *Milliken* v. *Bradley*, 433 U.S. 267, 280.

3. A concern for the impact of remedies upon innocent third persons is deeply embedded in the historic power of equity. Whatever may be the appropriate equitable balance when a remedy is sought to make whole the *victims of discrimination* at the expense of innocent employees, there is simply no competition of legitimate interests that could justify the displacement of innocent employees, on the basis of race, for the benefit of *nonvictims*.

4. Congress decided in enacting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, to disapprove quota remedies. That decision establishes the unavailability of the remedy in question under Title VII and also points to the same conclusion with respect to § 1981 and the Fourteenth Amendment (here invoked through 42 U.S.C. § 1983). The remedial provision implementing §§ 1981 and 1983—42 U.S.C. § 1988—directs that remedies thereunder be fashioned "in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect." As complete make-whole relief can be provided to victims without a quota remedy, it is "suitable" to respect the congressional judgment against quota remedies. Indeed, even on the hypothesis that courts have power to go beyond § 1988 in fashioning remedies for Fourteenth Amendment violations, the proper course is to respect the congressional judgment where, as here, that judgment does not preclude the provision of complete make-whole relief. *Bush* v. *Lucas*, —— U.S. —— 51 L.W. 4752 (June 13, 1983).

5. Congress also decided in enacting Title VII to protect *bona fide* seniority systems. That decision precludes the issuance under Title VII of remedies conflicting with seniority systems when such remedies are not

needed to restore victims to their rightful place. And for the reason just stated, that congressional judgment is entitled to respect in the fashioning of remedies under §§ 1981, 1983, and the Fourteenth Amendment.

6. It is a difficult and unsettled question whether a federal court violates the Constitution by ordering a quota remedy such as that at issue here. This Court's settled rule to avoid, where "fairly possible," resolving difficult constitutional questions is additional reason, if any be needed, why the quota remedy entered below should be foresworn as lacking equity.

ARGUMENT

1. The point of departure for analyzing the propriety of a court order displacing employees of one race who have done no wrong from their jobs to make room for persons of another race who have not been the victims of any discrimination by the defendant is the nature of the violation for which the order in question purports to be the remedy. The remedial power of a court sitting in equity is not unlimited. *Swann* v. *Board of Education*, 402 U.S. 1, 3; *Hills* v. *Gautreaux*, 425 U.S. 284, 294; *Pasadena City Bd. of Education* v. *Spangler*, 427 U.S. 424, 434. Cf. *Hecht* v. *Bowles*, 321 U.S. 321, 329-330. Foremost among the applicable limitations is that "the scope of the remedy is determined by the nature and extent of the . . . violation." *Milliken* v. *Bradley*, 418 U.S. 717, 744 (*Milliken I*); see also, e.g., *Swann*, 402 U.S. at 16; *Milliken* v. *Bradley*, 433 U.S. 267, 280 (*Milliken II*). Given that limitation, the task of the equity court, "once a . . . violation is found, . . . is . . . to tailor 'the scope of the remedy' to fit 'the nature and extent of the . . . violation.'" *Hills*, 425 U.S. at 294; see also *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420. And this Court has defined with precision the way in which the remedy must relate to the violation: "the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to

the position they would have occupied in the absence of such conduct.'" *Milliken II*, 433 U.S. at 280; see also *Milliken I* at 746.

Thus, in assessing whether a remedial decree has exceeded proper limits, it is critical to know what is the violation being remedied, who are the victims, and how has the violation affected the victims. Here, as stated *supra* at pp. 2-3, we proceed by assuming *arguendo* that the plaintiffs could have proven the violations alleged in their complaints. Broadly read, the complaints allege that the defendants, who together constitute the employer in this case, violated Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e), the Civil Rights Act of 1866 (42 U.S.C. § 1981), and the Fourteenth Amendment (invoked pursuant to 42 U.S.C. § 1983), by discriminating against blacks in hiring and in promoting. The complaints do not allege that *all* blacks employed by the Memphis Fire Department in fact were injured by one or both forms of discrimination; indeed, neither of the plaintiffs alleges that he personally was the victim of any hiring discrimination.

Each of the three provisions sued under is designed to protect individuals from discrimination on the basis of race; none is intended to mandate racial balance or the achievement of particular proportions of the races in a given workforce. In Title VII, the language of the provision defining unlawful conduct (§ 703) and of the remedial provision (§ 706(g)) focuses expressly on protecting the "individual" from racial, religious, sexual or national origin discrimination in employment. And this Court has repeatedly recognzed that focus. In *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702, 708, this Court stated:

> The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual or national class. . . . Even a true generalization about a class

> is an insufficient reason for disqualifying an individual to whom the generalization does not apply.

In *Connecticut* v. *Teal*, 457 U.S. 440, 453-454, the point was repeated:

> The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole. Indeed, the entire statute and its legislative history are replete with references to protection for the individual employee. See, *e.g.*, §§ 703(a)(1), (b), (c) . . . .

And, most recently, in *Arizona Governing Committee* v. *Norris*, —— U.S. ——, 51 L.W. 5243 (July 6, 1983), this point was reiterated in each of the individual opinions. *Id.* at 5244, 5245 (Opinion of Justice Marshall); 5251 (Opinion of Justice Powell); 5252 (Opinion of Justice O'Connor).

Similarly, § 1983 and § 1981 create rights, or establish a mechanism to enforce rights, in *individuals* to be free of discrimination based on race. Section 1983 is designed to protect "any citizen . . . or other person within the jurisdiction"; transgressors incur liability "to the party injured." The source of the right to be free of racial discrimination enforceable under § 1983 is the Fourteenth Amendment. That Amendment, like Title VII, is designed at protecting individuals. As this Court stated in *Shelley* v. *Kraemer*, 334 U.S. 1, 22:

> The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

See also *Castaneda* v. *Partita*, 430 U.S. 482, 499-500; *University of California Regents* v. *Bakke*, 438 U.S. 265, 299 (Opinion of Justice Powell.)

And, consistent with that understanding, this Court repeatedly has held that the Fourteenth Amendment, whether sued on directly or through § 1983, does not prohibit official conduct simply because that conduct has a greater adverse effect on racial or ethnic minority *groups* than on majority *groups*. In *Washington* v. *Davis*, 426 U.S. 229, 239, the Court held that "a racially neutral qualification for employment is [not] discriminatory . . . simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups." *Id.* at 245. "That other Negroes also failed to score well would, alone, not demonstrate that [plaintiffs] *individually* were being denied equal protection of the laws . . ." *Id.* at 246 (emphasis added). See also, *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-265; *Personnel Administrator of Mass.* v. *Feeney*, 442 U.S. 256, 272.

Actions brought under § 1983, and founded as here on the Fourteenth Amendment, are thus to provide "the party injured" relief from purposeful discrimination by the state, and this Court has expressly stated that the Fourteenth Amendment does not require "any particular degree of racial balance or mixing." *Swann*, 402 U.S. at 24; *Milliken I*, 418 U.S. at 739-741.

The same is true of § 1981. That statute too is addressed to discrimination against individuals as such. In *General Building Contractors Association* v. *Pennsylvania*, —— U.S. ——, 50 L.W. 4975, 4977 (June 29, 1982), this Court held that § 1981 does not reach "practices that merely result in a disproportionate impact on a particular class. . . ."

In short, the vice of the employer's practices in this case, assuming the allegations of the complaints to be true, is not that the employer failed to achieve a racial balance, but that the employer intentionally refused to hire or promote particular black individuals because of their race. The victims of that violation are those class members who, within the limitations period, applied for

and were refused hire or promotion on account of their race or who would have so applied but did not because of knowledge of the employer's racial practices. *Teamsters* v. *United States*, 431 U.S. 324, 357-377. And, what each of those victims has lost as a result of that violation is the wages, benefits, and seniority status that he would have received (and would presently enjoy) but for the defendants' wrongful refusal to hire or promote him. These, then, are the parameters that determine the scope of the remedy permitted in this action.

2. It follows from what we have shown thus far that the individuals who have suffered discrimination by the defendants—the victims—are the ones entitled to be made whole. Individuals whose claim to an entitlement to relief is that they are members of the same minority group as the victims, and who have not suffered from such discrimination, are already in "the position they would have occupied in the absence of [the defendants' discriminatory] conduct," *Milliken II*, 433 U.S. at 280, and are not entitled to a court order that improves their position.

This limitation on equitable decrees is confirmed by decisions of this Court implementing Title VII. Those decisions are instructive with regard to §§ 1981 and 1983 as well, for this Court has recognized that Title VII's remedial provision—§ 706(g)—authorizes the courts to exercise "the 'historic power of equity.'"[3] In *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, the Court drew the line as to the scope of permissible remedy between make-whole relief for "actual victims of racial discrimination" (*Franks*, 424 U.S. at 772), which is permitted, indeed virtually required, and relief for non-victims of such discrimination, which is not permitted. In *Franks*, the Court stated that the "federal courts

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[3] *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 416, 420-421. See also, *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 764, 777 & n.39; *id.* at 785-786, 789-790 (Opinion of Justice Powell); *Teamsters*, *supra*, 431 U.S. at 374-375; *Ford Motor Co.* v. *EEOC*, —— U.S. ——, 50 L.W. 4937, 4939 (June 28, 1982).

are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination in hiring." 424 U.S. at 764. And the Court made clear that members of the plaintiff class in *Franks* who were found *not* to be actual victims of the defendant employer's discrimination—*viz.*, who were "not in fact discriminatorily refused employment as an ORT driver" (*id.* at 773 n.32)—would not be entitled to any equitable relief. *Id.* at 772-773, and n.32. Then, in *Teamsters*, the Court analyzed at length the question of how to determine whether a claimant for relief is an actual victim of the litigated violation and thus eligible for relief. 431 U.S. at 356-377. That lengthy discussion in *Teamsters* would have been pointless if courts were empowered under Title VII to provide remedies to non-victims.[4]

The result in *Franks* and *Teamsters* follows from the general principles of equity discussed above: the victims of the violation are made whole for the losses they suffered as a result of the violation; and the remedy is afforded only to those who are victims of that violation.[5]

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[4] Under *Franks* and *Teamsters*, when a class violation of hiring discrimination is proven, the burden of proof shifts to the defendant to establish that individual members of the class who applied for the position or positions in question were not actually victims of the violation. This shift in the burden of proof, far from authorizing relief to nonvictims, simply determines how the court is to decide whether a given individual *was* a victim of discrimination and is thus entitled to relief. Members of the class against whom the unlawful practice was committed—*e.g.* black applicants for jobs from an employer who has been proved to have had an across-the-board practice of refusing to hire blacks—are presumed to be vticims, unless the defendant proves otherwise. *Franks*, 424 U.S. at 773 n.32; *Teamsters*, 431 U.S. at 357-362.

[5] This Court's school desegregation decisions follow precisely the same remedial principle: " 'to restore the victims of discriminatory conduct to the positions they would have occupied in the absence of such conduct.' " *Milliken II*, 433 U.S. at 280. In school cases, the violation generally consists of practices intentionally maintained

3. In the context of competitive hiring and competitive promotion decisions, however, the Court has recognized that even a remedy designed only to make the victims of discrimination whole has a heavy cost: Where a court order confers upon the individual who was a victim of the employer's wrong an improved competitive status with respect to promotion, or as in this case layoff, some employee, who was not in any respect responsible for the employer's wrong, is of necessity disadvantaged. A majority of the Court in *Franks* determined that it is consistent with equity for the innocent employee to be disadvantaged so that the victim can be made whole. *Franks*, 424 U.S. at 776-779; compare *id.* at 780-781 (Opinion of Chief Justice Burger) and *id.* at 787-793 (Opinion of Justice Powell.) But the Court has also determined that the balance of equities is quite different when the question is whether to disadvantage the innocent employee of one race in order to confer a competitive advantage on an individual of another race who was not the victim of any wrong of the employer and thus does not have a make-whole claim. *Teamsters* and *Ford Motor Co.* v. *EEOC*, —— U.S. ——, 50 L.W. 4937 (June 28, 1982), stand for the following proposition: it is not equitable for a court to direct that, on the basis of race, an innocent employee be deprived of his job so that he

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by a school board for the purpose of segregating the races. All minority students subjected to such practices are victims of the violation. To make such victims whole may require both the "dismantling" of the discriminatory practices and the affirmative correction of education deficiencies which resulted from those practices. *Milliken II*, 433 U.S. at 282-283; *Swann*, 402 U.S. at 28, 31-32. In that context, for example, make-whole relief may require that a "dual system" be dismantled, which may in turn require such actions as race-conscious assignment policies for teachers and pupils alike. But, in that context, too, this Court has been careful to confine remedial decrees to the make-whole purpose, and has not permitted such decrees to be used to achieve goals, such as racial balancing, beyond that purpose. *Swann*, 402 U.S. at 15-16, 31-32; *Pasadena City Bd. of Education*, 427 U.S. at 435-437; *Dayton Board of Education*, 433 U.S. at 419-420 (1977).

may be replaced by an employee who was not the victim of any discrimination by the employer.

In *Teamsters*, the Court first made it clear that non-victims have no entitlement to a remedy of competitive seniority, 431 U.S. at 367-372, and saw the judiciary's task of equitable balancing as called for only with respect to victims:

> [*A*]*fter the victims have been identified and their rightful place determined*, the District Court will . . . be faced with the delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing. [431 U.S. at 372, emphasis added].[6]

In *Ford Motor Co.*, this Court disapproved as inequitable a remedy that would have encouraged employers to give competitive seniority advantage to persons who *claim* they are victims of discrimination but whose claims have not yet been adjudicated:

> . . . Title VII . . . permits us to consider the rights of "innocent third parties." *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 723 (1978). See also *Teamsters* v. *United States*, 432 U.S. 324, 371-376 (1977). The lower court's rule places a particularly onerous burden on the innocent employees of an employer charged with discrimination. Under the court's rule, an employer may cap backpay liability only by forcing his incumbent employees to yield seniority to a person who has not proven, and may never prove, unlawful discrimination. . . .
>
> The sacrifice demanded by the lower court's rule, moreover, leaves the displaced workers without any remedy against claimants who fail to establish their claims. If, for example, layoffs occur while the Title VII suit is pending, an employer may have to furlough an innocent worker indefinitely while retain-

[6] Even thus limited to victims, the Court saw striking the balance in *Teamsters* (where the innocent employees were on layoff) as not foreordained by the decision in *Franks*. See 431 U.S. at 374-376.

> ing a claimant who was given retroactive seniority. If the claimant subsequently fails to prove unlawful discrimination, the worker unfairly relegated to the unemployment lines has no redress for the wrong done him. We do not believe that " 'the large objectives' " of Title VII, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 416 (1975) (citation omitted), require innocent employees to carry such a heavy burden. [50 L.W. at 4942].

Where, as in the instant case, a court is asked to direct that a nonvictim of discrimination be given the job of an innocent employee, solely because the nonvictim is the same race as other persons who were actually discriminated against by the employer, there is not the competition of legitimate interests that calls into play equitable discretion. To give the nonvictim the job is not to "restore [him to his] rightful place" (*Teamsters*, 431 U.S. at 375)—he was not wrongfully deprived of that place in the first instance. On the other hand, the "innocent worker . . . unfairly relegated to the unemployment lines" as a result of such a court order would have a "wrong done him." *Ford Motor Co.*, 50 L.W. at 4942.[7]

4. There is yet another consideration that counsels against upholding the quota remedy entered below: the explicit congressional determination not to provide for quota remedies in Title VII cases. In enacting Title VII, Congress specifically addressed the question of court-ordered quotas and determined unequivocally not to permit them. We set forth below the provisions of the stat-

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[7] Indeed, had the substance of the injunction in this case been instead part of a "private, voluntary, race-conscious affirmative action plan[]" set up by an employer, or an employer and a union, that plan might well be found in *violation* of Title VII. In *Steelworkers* v. *Weber*, 443 U.S. 193, 208, in explaining why the plan at issue in that case did not violate Title VII, the Court emphasized:

> At the same time, the plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hirees.

ute and the legislative history that manifest that determination. Before turning to that showing, however, we pause to discuss the significance of the determinations that Congress made in enacting Title VII to the remedial issues in this case.

As previously noted, the plaintiffs' claims in this case were brought not just under Title VII but under §§ 1981, 1983, and the Fourteenth Amendment as well. Insofar as the action is grounded in Title VII, the determinations made by Congress respecting the scope of remedies for violation of that statute are of course controlling; the courts are without power to furnish remedies for Title VII violations that Congress has not authorized. Those determinations do not, however, furnish a similarly conclusive answer respecting the power of courts under §§ 1981 and 1983; statutes that were enacted a century before and that contain their own remedial provision. See, *e.g.*, *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 459-60. The remedial authorization furnished by Congress with respect to actions brought under §§ 1981 and 1983 is contained in 42 U.S.C. § 1988, which provides in pertinent part:

> The jurisdiction in civil and criminal matters conferred on the district courts by [*inter alia*, §§ 1981 and 1983] *shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect* . . . [Emphasis added].

This provision bespeaks a congressional intention that points the courts, in the circumstances of this case, to the explicit decisions respecting remedies made by Congress in such statutes as Title VII, subject to the caveat that those decisions may not be carried over if they would prevent "suitable" relief to vindicate the wrongs made actionable by §§ 1981 and 1983. Where, as here, complete make-whole relief can be provided without incorporating a remedy disapproved by Congress, it is "suitable" to abstain from the disapproved remedy.

while, as we show below, highly relevant,

Of course, given that § 1983 furnishes a cause of action to enforce what here are *constitutional* rights, it is arguable that the courts' remedial power is not circumscribed by § 1988. It does not follow, however, that Congress' judgments in Title VII about what remedies are appropriate, and what inappropriate, are to be disregarded in fashioning relief for constitutional violations. Thus, even assuming *arguendo* that the federal courts have *power* in constitutional cases to enter quota remedies compelling the layoff of innocent employees of one race to make room for nonvictims of another race, the congressional judgment that such remedies are inappropriate is entitled to weight in the courts' determination whether that power should be exercised. In *Bush* v. *Lucas*, —— U.S. ——, 51 L.W. 4752 (June 13, 1983), for example, where the petitioner sought "a new nonstatutory damages remedy for federal employees whose First Amendment rights are violated by their superiors," (*id.* at 4753), this Court declined to adopt this remedy, explaining:

> Because such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive remedies . . . we conclude that it would be inappropriate for us to supplement that regular scheme with a new judicial remedy. [51 L.W. at 4753.]

This Court did not question its "power [in suits arising directly under the Constitution] to grant relief that is not expressly authorized by statute" (*id.* at 4754), but concluded that the circumstances warranted no departure from its predisposition that "such power is to be exercised in the light of relevant policy determinations made by the Congress" (*id.*). The Court ultimately answered in the negative the question "whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by a new judicial remedy for the constitutional violation at issue." *Id.* at 4758.

With that preface, and with the knowledge that the remedy in dispute here is not necessary to make whole the victims of the wrong alleged,[8] we turn to a demonstration that Congress did indeed, in enacting Title VII, specifically reject the concept of quota remedies.

a. The sole Title VII provision defining the remedies that a court may order upon finding a violation of the statute is § 706(g). As enacted in 1964, § 706(g) empowered courts, upon finding a violation, to "enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . ." The last sentence of § 706(g), in turn, states that even where a court "finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful Title VII employment practice," the resulting remedial order may *not* run in favor of an individual who suffered adverse employment consequences for "any reason other" than such discrimination. Senator Humphrey cited this sentence during the debates as proof that the opponents' charge that the bill authorized court-ordered quotas was incorrect (see App. p. 2a, *infra*). Certainly then the literal language of § 706(g) bars a remedial order that runs in favor of individuals who are members of a minority group but who have never suffered employment discrimination at the hands of the respondent. A quota remedy—*viz.* a remedy providing employment benefits to members of a minority group who have not been shown to have suffered adverse employment consequences by reason of the respondent's unlawful employment practice—therefore appears from the words of § 706(g) to be the very paradigm of the remedial

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[8] The Court found it important in *Bush* that "Congress intended that these remedies [*i.e.* without the additional remedy sought in *Bush*] would put the employee 'in the same position he would have been in had the unjustified or erroneous personnel action not taken place.'" *Id.* at 4758. See also, *id.* at 4759 (Opinion of Justice Marshall).

order Congress determined should *not* issue in enacting the 1964 Civil Rights Act.

Moreover, the Court has recognized that the decisions under § 10(c) of the NLRA are an informative guide to the intent of the Congress that enacted § 706(g). *Franks*, 424 U.S. at 769, 774-775 and n.34; *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 419; *Teamsters*, 431 U.S. at 366-367; *Ford Motor Co.*, 50 LW at 4939 n.8. It was well settled by 1964 that when an employer is found to have discriminated against union members in violation of § 8(a)(3) of the NLRA, the remedy provided under § 10(c) by the National Labor Relations Board is to reinstate the victims of the discrimination and award them backpay and rightful place seniority. In the NLRA's history an employer had never been directed to give preferential treatment to union members who were not victims of the violation.[9]

b. Title VII's sponsors repeatedly confirmed that the Title does not empower the courts to issue quota remedies. Before the 1964 debate began, the bill's opponents cited quota remedies as one of the evils that would be produced. H.R. Rep. 914, 88th Cong., 1st Sess. (1963) at 72. These opponents declared this "a not too subtle system of racism-in-reverse." *Id.* at 73. In response to this charge, the principal sponsors of the bill repeatedly and unequivocally declared that under tne bill the courts would be without power to order quota remedies. We quote these declarations in Part I of the Appendix to this brief.

The statements quoted in Part I of the Appendix—which explicitly articulate the courts' want of power to order quota remedies—are not by any means the only

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[9] See *Franks*, 424 at 774-775, n.34; and see, *e.g.*, *Nevada Consolidated Cooper Corp.*, 26 NLRB 1182, 1231 (1940), enforced, 316 U.S. 105; *Darigold Dairy Products Co.*, 194 NLRB 701 (1971); *Great Lakes Dredge Dock Co.*, 169 NLRB 631, 635 (1968); *The Hughes Corp.*, 135 NLRB 1222, 1223 (1962); *Atlantic Maintenance Co.*, 134 NLRB 1328, 1330 (1961), enforced, 305 F.2d 604 (3d Cir. 1962).

"anti-quota" statements made by the bill's proponents. In addition to the charge that the EEOC and/or courts would impose quota remedies, opponents charged that racial imbalance would be found to be a *per se* violation of Title VII, and that employers would opt for quotas to avoid the *inference* of discrimination that might be drawn from racial imbalance.[10] In answering these various charges, the proponents repeatedly denied that Title VII would require quotas. Some of these remarks were clearly responding to "quota" charges other than that courts would order quotas; others are ambiguous and may well have been specifically addressed to the charge that courts would order quotas. But all reflect the mood of the 1964 Congress and thus help explain *why* § 706(g) was drafted so as not to empower the courts to issue quota remedies. We set forth a number of these statements in Part II of the Appendix to this brief.

In short, everything said and done in 1964 leads to the conclusion that Congress in enacting Title VII intended to provide affirmative remedies for the victims of the defendants' discrimination but not for nonvictims. That intent as we have shown is crystalized in positive statutory law in both the basic substantive provision of the Title—§ 703 (see *supra* at p. 8)—and in the basic remedial provision—§ 706(g).

c. Nothing Congress has said or done since provides a basis for reading Title VII as amended differently in this regard from Title VII as originally passed. In 1972, Title VII was amended by the Equal Employment Opportunity Act of 1972. Section 703, which as we have shown, *supra* at p. 8, defines the practices prohibited by the Act as wrongs to "individuals," was not amended. Section 706(g) was amended to add an authorization to grant "any other equitable relief the court deems appro-

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[10] See, *e.g.*, 110 Cong. Rec. at 5092 (Sen. Hill); 7418-20 (Sen. Robertson); 7800, 8500-01 (Sen. Smathers); 8618 (Sen. Sparkman).

priate" to the specific remedies already contained in the provision. The only explanation for that amendment—the Section-by-Section Analysis that was introduced in both houses [11]—indicates a single remedial objective (118 Cong. Rec. 7166, 7168):

> *Section 706(g)*—This subsection is similar to the present section 706(g) of the Act. . .
>
> The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that *persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.* [Emphasis added].

The Congress that "added the phrase speaking to 'other equitable relief' in § 706(g) . . . indicated that 'rightful place' was the intended objective of Title VII and the relief accorded thereunder." *Franks, supra*, 424 U.S. at 764, n.21. This Section-by-Section Analysis "is emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require *to effect restitution, making whole insofar as possible the victims of racial discrimination* . . ." *Id.* at 764 (emphasis added).

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[11] The Section-by-Section Analysis quoted in text was first submitted to the Senate by Senator Williams (the bill's floor manager in the Senate) prior to adoption of the Senate bill. Senator Williams submitted it again in conjunction with the Conference Report, as did Rep. Perkins in the House. See *Legislative History of the Equal Employment Opportunity Act of 1972*, prepared by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare (Nov. 1972), pp. xv n.3, 1769, 1773-74, 1843-44, 1848, 1856.

The legislative history of the 1972 amendments is devoid of a single word suggesting that the amendment to § 706(g) was intended to authorize quota remedies. Given the explicit anti-quota decision made in 1964, and the retention in 1972 of the sentence in § 706(g) that was the embodiment of that decision (see p. 17, *supra*), there is no conceivable warrant for construing the addition of "other equitable relief" as an authorization of quota remedies.

It has been suggested by parties in other cases [12] that even granting that the 1964 and 1972 Congress' legislative *actions* do not provide support for the proposition that Title VII authorizes quota remedies, the judicial power to order such remedies may properly be inferred from certain congressional *refusals to act* in 1972. Relying on such inferences is hazardous at best. "Ordinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation." *Bob Jones University* v. *United States*, —— U.S. ——, 51 L.W. 4593, 4600 (May 24, 1983). But there is no need here to engage in the debate as to the balance between the hazards and utility of drawing such inferences. For in this instance the congressional determinations in 1972 not to amend the 1964 Act do not in fact support the inference that the paradoxical purpose of certain refusals to alter Title VII was to signal a new consensus that both victims of the defendant's discrimination and nonvictims alike are to be entitled to affirmative relief under Title VII. A review of what happened in the House is dispositive.

The House debate focused on two competing bills—one (H.R. 1746) introduced by Rep. Augustus Hawkins and reported out by the House Labor Committee, and the other (H.R. 9247) offered by Rep. John Erlenborn

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[12] See, *e.g.*, Brief for Respondent in *Boston Firefighters Union, Local 718* v. *Boston Chapter, NAACP, Inc.*, Nos. 82-185, *et al.* at pp. 48-53.

"as an amendment in the nature of a substitute." 72 Leg. Hist. 150-151.[13] The principal differences between the bills—and the subject of virtually all the debate—involved matters wholly irrelevant to the issue here (e.g., Should the EEOC be given "cease and desist" power? Should Title VII be extended to public employment?) Insofar as relevant here, the difference between the bills was that the Comittee bill proposed to transfer administration of Executive Order 11246 from the Department of Labor's Office of Federal Contract Compliance (OFCC) to the EEOC, while the Erlenborn bill did not. The Committee bill was accordingly perceived by some as providing the EEOC with power to order quotas, for the OFCC in *its* administration of the Executive Order had made it a condition to receipt of government contracts that the contractor adopt "goals and timetables." The discussion of quotas in the House in 1972 thus centered on the propriety of quotas under the Executive Order. Rep. Erlenborn stated the theory on which quotas, although properly precluded from imposition under Title VII, had been treated differently under the Executive Order:

> The OFCC is an altogether different type of jurisdiction [from the EEOC]. It is not based upon constitutional rights. It is not based upon statutory rights.
>
> The genesis of the power of the OFCC is the contractual relationship that exists between the Federal Government and those with whom they contract for the acquisition of goods and services. In this jurisdiction the OFCC can and does go beyond those powers granted by the 1964 Civil Rights Act. I think it is important to note that the Chairman of the Equal Employment Opportunity Commission himself

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[13] We use "72 Leg. Hist. ———" to refer to *Legislative History of the Equal Employment Oppotrunity Act of 1972*, prepared by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare (Nov. 1972).

> has testified that you cannot mix these two enforcement authorities. [72 Leg. Hist. at 231].

Supporters of the Committee bill did not dispute the theoretical basis for such a distinction, and they proposed to resolve the dilemma not by leaving administration of the Executive Order with the OFCC, but by making Title VII's ban on quotas equally applicable to the Executive Order: Their solution was that coincident with transfer to the EEOC of authority to enforce the Executive Order, the EEOC should be "prohibited from imposing or requiring a quot[a] or preferential treatment." 72 Leg. Hist. at 189. Rep. Dent, the floor manager of the Committee bill, explained the reason for incorporating this express prohibition.

> My . . . amendment would forbid the EEOC from imposing any quotas or preferential treatment of any employees in its administration of the Federal contract-compliance program. This responsibility, which is now vested in the Office of Federal Contract Compliance of the Department of Labor, would be transferred by H.R. 1746 to the Commission. *Such a prohibition against the imposition of quotas or preferential treatment already applies to actions brought under title VII. My amendment would, for the first time, apply these restrictions to the Federal contract-compliance program.* [72 Leg. Hist. at 190; emphasis added. See also *id.* at 199 (Rep. Perkins); 204, 208 (Rep. Hawkins)].

While there was some debate over the propriety of exacting quotas under the Executive Order as the price for receipt of government contracts (see, *e.g.*, *id.*, at 202, 208-209, 222-223, 231), there was unanimity that quotas were not to be imposed upon employers generally as a matter of statutory law. Rep. Hawkins, the author of the Committee bill, declared:

> [S]*ome say that this bill seeks to establish quotas . . . Not only does Title VII prohibit this,* but it establishes beyond any doubt a prohibition against any individual white as well as black being discriminated

> against in employment. It only seeks to insure that persons will be treated on their individual merits and in accordance with their qualifications. [72 Leg. Hist. at 204; emphasis added].[14]

And Rep. Erlenborn, the author of the rival bill, correctly identified the narrow scope of the dialogue by pointing out that *neither the Committee bill nor the Erlenborn substitute "is going to repeal the prohibition against quotas that is in Title VII of the Civil Rights Act"* [*Id.* at 261].[15]

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[14] Rep. Hawkins later repeated, during a colloquy, that Title VII already "prohibits the establishment of quotas." *Id.* at 209.

[15] In the end, the House voted to adopt the Erlenborn substitute (*id.* at 312-314). As that substitute contained no provision respecting the administration of Executive Order 11246, the House never voted on the propriety of quotas under the Executive Order.

The fact that the House debate manifests the uniform understanding that Title VII did not permit court-ordered quotas—not a surprising fact in view of the definitive resolution of that controversial issue just eight years earlier—precludes any notion that, because a handful of lower court cases purportedly authorizing court-ordered quotas had been decided by 1972, Congress should be deemed to have acted on the assumption that Title VII authorized such quotas.

Indeed, our research has uncovered only two cases decided prior to the completion of the 1972 consideration of Title VII that even arguably approved quota remedies, and in both the approval was cryptic. In *Asbestos Workers* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969), the court upheld an injunction striking down nepotism and prior experience as requirements for union membership and "ordered the development of objective mebership criteria," 407 F.2d at 1051, not racial quotas or preferences, to govern future admissions to union membership. Pending development of such objective criteria, the injunction prohibited new admissions of members (save identified discriminatees) and directed that during the interim period work referrals of existing members be made on a chronological basis, with alternating referrals of whites and blacks, *id.* In a cryptic passage near the end of its opinion, the Fifth Circuit explained that the temporary alternating referrals were required for "administrative reasons." *Id.* at 1055. In *United States* v. *Ironworkers Local 86*, 443 F.2d 544, 553-554 (9th Cir.) *cert. denied*, 404 U.S. 984 (1971), the Court, relying on *Vogler*, sustained an injunc-

While the Senate's consideration of proposed amendments was hardly more indicative of a desire to overturn the 1964 decision to prohibit quota remedies, we relegate discussion of the Senate's consideration to the margin. For given the House's unalterable opposition to statutorily-imposed quotas, nothing the Senate might have done *alone* could have effectuated a turnaround of that decision. As this Court has so recently confirmed, a congressional decision made by both houses and signed by the President may not later be overturned even by the positive action of one house, *Immigration and Naturalization Service* v. *Chadha*, —— U.S. ——, 51 L.W. 4907, 4916-18 (June 28, 1983), and *a fortiori* cannot be found inferentially to have been overturned by rejection of proposed amendments within one house.[16]

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tion that contained compulsory numerical guidelines for minority admissions into apprentice programs, rejecting arguments that the injunction violated § 703(j). The court declared that the injunction it was affirming "did not establish a system of racial quotas or 'preferences' in violation of section 703(j)." 443 F.2d at 554. Thus while close reading of *Vogler* and *Ironworkers* reveals that orders establishing racial preferences were approved, neither case purported to endorse court-ordered racial quotas in Title VII cases. And there was as of 1972 case law and commentary supporting the opposite proposition, *viz.*, that quota remedies are not appropriate under Title VII. *Castro* v. *Beecher*, 334 F. Supp. 930, 945 (D.Mass. 1971); *Developments in the Law—Title VII*, 84 Harv. L. Rev. 1109, 1114-16 (1971).

To say the least, there was not on this issue in 1972 "established judicial precedent" "consistently and routinely" applied as there was in *Herman & MacLean* v. *Huddeston*, —— U.S. ——, 51 LW 4099, 4102 (Jan. 24, 1983); see also, *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 379 (1982) ("the federal courts routinely and consistently had recognized an implied cause of action").

[16] In the Senate, there was one proposed amendment that related tangentially to the issue of court-ordered quotas. Senator Ervin, in the course of introducing numerous amendments to prolong a filibuster, introduced one prohibiting any "department, agency, or officer of the United States" from requiring employers to "practic[e] discrimination in reverse by employing persons" in percentages or

5. That the order entered below would conflict with a bona fide seniority system is another consideration counseling against its propriety. As we show below, that conflict renders the remedy unavailable under Title VII.[17] And while that is not dispositive of the remedy's availability under §§ 1981, 1983 and the Fourteenth Amend-

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quotas on the basis of race, sex, religion or national origin (72 Leg. Hist. at 1017). This amendment, he explained, was addressed primarily to the OFCC's implementation of Executive Order 11246 to require government contractors to adopt quotas ("the Philadelphia Plan"), and secondarily to "[t]he EEOC", which "on less frequent occasions, has hailed employers before its bar to practice discrimination in reverse." (*Id.* at 1042-45.) The amendment was defeated by a vote of 44-22 (*Id.* at 1074-75).

Given the legislative dynamic in which the Ervin amendment was proposed—an ongoing filibuster that Senator Ervin was seeking to prolong through the introduction of multiple amendments—it is entirely possible that those seeking to end the filibuster (and who voted against *all* the amendments proposed by Senator Ervin) were deciding their vote not on the substance of each amendment, but on the tactical judgment that the way to end the filibuster was to vote down each amendment proffered by those conducting the filibuster. The importance of such tactical considerations in the legislative process make it *always* dangerous to impute a new meaning to a previously enacted statute from the choice of a later Congress *not* to amend that legislation.

Moreover, those not wishing to forbid goals and timetables under the Executive Order were required to vote against the Ervin Amendment, and the vote therefore cannot be understood as manifesting a decision to overturn Congress' 1964 decision disapproving statutorily-imposed quotas.

[17] While it is an open question whether the seniority system here is embodied in a legally enforceable collective agreement (the court below merely assuming *arguendo* that it is, see n.1, *supra*), we do not understand the system's protection under § 703(h) of Title VII to depend upon the resolution of that question. There is no dispute that the employer here wished to implement the seniority system unilaterally, and that the employees had justifiable expectations that layoff decisions would be determined by seniority. We are aware of no authority construing § 703(h) to afford less protection to seniority systems established unilaterally by employers or in non-binding understandings between unions and employers than to those embodied in legally enforceable agreements.

ment, the discussion *supra* at pp. 15-16 demonstrates the pertinence of the congressional decision under Title VII to the appropriateness of the remedy under those provisions.

Section 703(h) is a reflection of Congress' specific desire to protect bona fide seniority systems. And while in terms § 703(h) merely declares that bona fide seniority systems are not to be held violative of Title VII, that provision reflects a congressional concern—that the seniority expectations of innocent employees not be overturned [18]—that must also be respected at the remedial stage of a lawsuit. On this point this case is analytically indistinguishable from *Porter Co.* v. *NLRB*, 397 U.S. 99. The Court dealt there with the relationship between § 8(d) of the NLRA, which states that an employer does not violate his duty to bargain by refusing to agree to a union proposal, and § 10(c), which empowers the NLRB to provide such affirmative remedies against violators "as will effectuate the purposes of the Act." The court of appeals, noting that § 8(d) is a prohibitory and not a remedial provision, held that it did not preclude the Board from directing an employer to agree to a union proposal as a remedy for violations independently found. This Court rejected that reasoning:

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[18] Opponents of Title VII, during the debates, had pointed to the bill's silence respecting seniority systems as leaving at least ambiguous "Title VII's *impact* on existing collectively bargained seniority rights" (*Teamsters*, 431 U.S. at 352 (emphasis added)), and had predicted that the bill would "destroy" such rights, *id.* at 350. That warning had led to an outpouring of responses from the bill's sposnors, quoted in *American Tobacco Co.* v. *Patterson*, 456 U.S. 53, 72-73, that "the bill would not affect seniority at all;" Title VII "would have no effect on seniority rights existing at the time it takes effect;" Title VII would "have no effect on established seniority rights;" seniority rights "are in no way affected by the bill." The sponsors' intent was that the bill would "protect . . . seniority systems." (*Id.* at 74.) Section 703(h) was added to confirm that intention, and the sponsors' statements following its addition to the bill "are to the effect that 'the Senate substitute bill expressly protects valid seniority systems.'" (*Id.*)

> We may agree with the Court of Appeals that as a matter of strict, literal interpretation [§ 8(d)] refers only to deciding when a violation has occurred, but we do not agree that the observation justifies the conclusion that the remedial powers of the Board are not also limited by the same considerations that led Congress to enact § 8(d). It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties. It would be anomalous indeed to hold that while § 8(d) prohibits the Board from relying on a refusal to agree as the sole evidence of bad-faith bargaining, the Act permits the Board to compel agreement in that same dispute. [397 U.S. at 107-108 (emphasis in original).]

Section 706(g) of Title VII, like its model § 10(c) of the NLRA (see p. 18 *supra*), authorizes "appropriate" remedies, and "the scope of a district court's remedial powers under Title VII is determined by the purposes of the Act." *Teamsters* v. *United States*, 431 U.S. 324, 364 (1977).[19] Thus, while § 703(h) of Title VII, like § 8(d) of the NLRA, speaks to whether a violation has occurred, both provisions express a congressional policy that precludes the fashioning of remedies inconsistent with that policy.[20]

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[19] See also, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 770-771 (1977).

[20] This Court's treatment of the interrelationship between § 703(h) and § 706(g) in *Franks*, *supra*, does not undercut the proposition just stated. In *Franks*, the plaintiffs were identifiable victims of post-Act hiring discrimination who sought merely their "rightful place": the place *in the seniority system* that the plaintiffs would have occupied but for the employer's discriminatory refusal to hire them. The Court held that the congressional desire to protect seniority systems did not preclude that particular relief, explaining:

> Petitioners do not ask for modification or elimination of the existing seniority system, but only for an award of the sen-

6. To the foregoing considerations, another must be added. Because we are here dealing with the propriety of courts imposing racial quota remedies, the issue has a constitutional dimension. *Shelley* v. *Kraemer*, 334 U.S. 1, 14-18. All of the opinions in *University of California Regents* v. *Bakke*, 438 U.S. 265, and *Fullilove* v. *Klutznick*, 448 U.S. 448, recognize significant limits on the power of government to engage in race-conscious action. We do not here rehearse the various positions stated in those opinions, or the particular implications of those positions for resolution of the constitutional question that would be presented here were the order entered below held equitable. We note only that, as we have shown, the racial quotas here are not necessary to, or even designed to, remedy the assumed violation in this case. Nor were the courts below carrying out any congressionally determined or mandated policy—quite the contrary as we have shown, *supra*, at pp. 17-28. And, the courts below made no findings to support a conclusion that the drastic con-

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iority status they would have individually enjoyed under the present system but for the illegal discriminatory refusal to hire. *It is this context that must shape our determination as to the meaning and effect of § 703(h).* [424 U.S. at 758, emphasis added.]

In contrast to the relief sought in *Franks*, the relief ordered in the instant case does constitute a "modification . . . of the existing seniority system." The challenged order here provides that persons who were *not* "victims of illegal discrimination"—and who therefore already are in their rightful place in the seniority system—are able to retain employment in preference to persons who have committed no wrong and who have superior seniority claims to that employment. In *American Tobacco*, *supra*, this Court indicated that rightful place relief for victims is likely the limit of the inroad upon protection of seniority rights permitted at the remedy stage of a Title VII action.

Title VII does affect seniority rights, for *Franks* v. *Bowman Transportation Co.*, *supra*, allows awards of retroactive seniority *to victims of unlawful discrimination*. However, Senator Clark . . . and other key proponents of the bill *intended that it have minimal impact on seniority systems*. [456 U.S. at 74, n.15, emphasis added].

sequences visited by the order here are necessary to achieve any important, much less compelling, governmental interest.

In these circumstances, we suggest that the appropriate disposition should be to foreswear the quota remedy imposed below as lacking equity without squarely addressing or deciding the constitutionality of its issuance. When asked to invalidate Acts of Congress, the Court has long followed "the 'cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided'." *United States* v. *Security Industrial Bank*, —— U.S. ——, 51 L.W. 4007, 4009 (Nov. 30, 1982), quoting *Crowell* v. *Benson*, 285 U.S. 22, 62. That course is likewise appropriate in formulating equitable remedies, especially where, as here, complete make-whole relief can be provided without implicating constitutional concerns, and those concerns arise only from an attempted extension of judicial power to achieve results unconnected to the making whole of victims of alleged discrimination.

CONCLUSION

For the above-stated reasons, the judgment below should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

Statements of Proponents of the Bill That Became the Civil Rights Act of 1964 Respecting the Availability of Quota Remedies under Title VII

I

In the House, the opening speech in support of the bill's passage was delivered by Representative Celler, the Chairman of the House Judiciary Committee. In pertinent part, he stated:

> In the event that wholly voluntary settlement proves to be impossible, the Commission could seek redress in the federal courts, but it would be required to prove in the court that the particular employer involved had in fact, discriminated against one or more of his employees because of race, religion or national origin. . . .
>
> *Even then, the court could not order that any preference be given to any particular race, religion or other group but would be limited to ordering an end to discrimination.*[3]

Subsequent to the House's passage of the bill, the Republican sponsors in the House published a memorandum describing the bill as passed. In pertinent part, the memorandum stated:

> Upon conclusion of the trial, the federal court may enjoin an employer or labor organization from practicing further discrimination and may order the hiring or reinstatement of an employee or the acceptance or reinstatement of a union member. But, *Title VII does not permit the ordering of racial quotas* in businesses or unions

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[3] 110 Cong. Rec. 1518 (emphasis added). See also *id.* at 1600 (Rep. Minish) ("no quota system will be set up").

and does not permit interferences with seniority rights of employees or union members. [*Id.* at 6566; emphasis added].

When the bill was taken up by the Senate, Senators Humphrey and Kuchel, the co-managers of the bill, undertook a description of each of the Titles. In the course of his description of Title VII, Senator Humphrey detailed the manner in which discrimination claims could be processed through suit and finding of discrimination, and then described the remedial powers available to a court:

> The relief sought in such a suit would be an injunction against future acts or practices of discrimination, but the Court could order appropriate affirmative relief, such as hiring or reinstatement of employees and payment of backpay. This relief is similar to that available under the National Labor Relations Act in connection with the unfair labor practices, 29 United States Code 160(b). *No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of Section 707(e)* [enacted, without change, as § 706(g)].
>
> * * *
>
> *Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial 'quota' or or to achieve a certain racial balance.*
>
> That bugaboo has been brought up a dozen times; but is nonexistent. [*Id.* at 6548 (emphasis added)]

Senator Kuchel made the other major opening speech in support of the bill. He, too, addressed the "scare charges" that the bill would permit court-ordered quotas:

> Title VII might justly be described as a modest step forward. Yet it is pictured by its opponents and detractors as an intrusion of numerous Federal inspectors as an intrusion of numerout Federal inspectors into our economic life. These inspectors would presumably dictate to labor unions and their members with regard to job seniority, seniority in apprenticeship programs, racial balance in job classifications, racial balance in membership, and preferential advancement for members of so-called minority groups. Nothing could be further from the truth. I have noted that the Equal Employment Opportunity Commission is empowered merely to investigate specific charges of discrimination and attempt to mediate or conciliate the dispute. It would have no opportunity to issue orders to anyone. Only a Federal court could do that, and only after it had been established in that court that discrimination because of race, religion, or national origin had in fact occurred. Any order issued by the Federal district court would, of course, be subject to appeal. *But the important point, in response to the scare charges which have been widely circulated to local unions throughout America, is that the Court cannot order preferential hiring or promotion consideration for any particular race, religion, or other group. Its power is solely limited to ordering an end to the discrimination which is in fact occurring.* [*Id.* at 6563 (emphasis added)].

Each day during the Senate debates on the Civil Rights bill, the principal Senate sponsors prepared a

Bipartisan Civil Rights Newsletter which was hand-delivered to the office of each Senator supporting the bill. Its purpose, as explained by Senator Humphrey, was "to keep Senators who are in favor of civil rights legislation informed of our point of view."[4] The April 11, 1964, issue of the Newsletter, published two days after the filibuster had begun, declared:

> Under title VII, *not even a Court*, much less the Commission, *could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title.* [*Id.* at 14465; emphasis added].

On May 25, Senator Humphrey introduced a brief explanation of the House bill which he said had been "read and approved by the bipartisan floor managers of the bill in both houses of Congress." *Id.* at 11847. In pertinent part, the explanation provided:

> The relief available is a court order enjoining the offender from engaging further in discriminatory practices and directing the offender to take appropriate affirmative action; for example, reinstating or hiring employees, with or without back pay, . . .
>
> *The Title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment.* [*Ibid.*]

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[4] *Id.* at 5042. It is apparent from the numerous references to the Newsletter that the publication was widely read by Senators. See *id.* 5044, 5046, 5079, 7474, 8369, 8912, 9105, 9870, 10622, 12210, 14464.

II

The Republican sponsors of Title VII in the House, in their "Additional Views" to the House Judiciary Report, declared:

> It must also be stressed that the [Equal Employment Opportunity] Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard, nothing in the title permits a person to demand employment. Of greater importance, the Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers or labor unions.[1]

Senator Clark, one of the bipartisan "captains" for Title VII, declared in his principal speech describing Title VII: "The suggestion that racial balance or quota systems would be imposed by this proposed legislation is entirely inaccurate."[2] At the conclusion of his speech he introduced a Justice Department letter that stated:

> There is no provision, either in title VII or in any other part of the bill, that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or any group for the purpose of achieving racial balance . . .[3]

And Senator Clark introduced written answers he had prepared to certain "objections" to Title VII that had been voiced, which included the following:

> Objection: The bill would require employers to establish quotas for nonwhites in proportion

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[1] H. Rep. No. 914, *supra*, at 150.

[2] 110 Cong. Rec. 7207.

[3] *Id.* at 7207.

to the percentage of nonwhites in the labor market area.

Answer: Quotas are themselves discriminatory.[4]

Senator Humphrey, in an extended colloquy with Senator Robertson, made the following remarks:

> I feel sure that the Senator from Virginia is not going to suggest or intimate that under this title of the bill there would be such a thing as a quota or a required percentage.
>
> * * *
>
> [C]an the Senator from Virginia point out in title VII any section or subsection or provision that would indicate that in connection with the elimination of the segregation in employment based on color, race, religion or national origin an employer would be required to hire any member of a certain ethnic group?
>
> * * *
>
> I would like to make an offer to [the Senator]. If the Senator can find in title VII . . . any language which provides that an employer will have to hire on the basis of percentage or quota related to color, race, religion, or national origin, I will start eating the pages one after another, because it is not in there.[5]

Senator Allot, one of the Republican sponsors of the bill, in another colloquy with Senator Smathers, expressed his disapproval of governmentally-imposed quotas:

> I completely agree with the Senator that if an employer were required to employ a person on

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[4] *Id.* at 7218.

[5] *Id.* at 7418-20.

> the basis of a quota, there would be no justification for that procedure under the American system . . .
>
> * * *
>
> The only point I wish to make is that if anyone sees in the bill quotas or percentages, he must read that language into it. It is not in the bill.[6]

Senator Keating, in a colloquy with Senator Sparkman, secured the latter's agreement that "the bill does not provide in any way for quotas of any kind."[7] Senator Keating later declared, in response to a public advertisement that the bill would require quotas:

> The coordinating committee has charged . . . that Title VII would . . . permit the Government to impose quotas and preferences upon employers and labor organizations in favor of minority groups . . .
>
> Title VII does not grant this authority to the Federal Government . . .
>
> An employer or labor organization must first be found to have practiced discrimination before a court can issue an order to prohibit further acts of discrimination in the first instance. Adequate administrative and judicial procedures have been provided in the title to assure that an order of court is only founded upon clear and conclusive evidence of discrimination. For the Commission to request or a court to order preferential treatment to a particular minority

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[6] *Id.* at 8500-01.

[7] *Id.* at 8618.

group would clearly be inconsistent with the guarantees of the Constitution.[8]

[8] *Id.* at 9113. In addition several Congressmen and Senators, recognizing that quotas would inevitably collide with the seniority rights of incumbent employees, cited protection of seniority systems as a reason for their opposition to quotas. See, e.g., the "Additional Remarks" of the Republican sponsors in the House, *supra* at 150; 110 Cong. Rec. 5423 (Sen. Humphrey); *id.* at 6563 (Sen. Kuchel); *id.* at 9113 (Sen. Keating); *id.* at 10520 (Sen. Carlson); *id.* at 11471 (Sen. Javits); *id.* at 15893 (Rep. McCulloch).

Nos. 82-206, 82-229

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IN THE

Supreme Court of the United States

October Term, 1983

FIREFIGHTERS LOCAL UNION NO. 1784,
Petitioner,

v.

CARL V. STOTTS, *et al.*,
Respondents.

MEMPHIS FIRE DEPARTMENT, *et al.*,
Petitioners,

v.

CARL V. STOTTS, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTIONS PRESENTED

1. May a court modify a seniority agreement on layoffs in order to preserve progress under a court ordered affirmative action program when unforeseen circumstances develop and literal application of the seniority provision would undo that progress?

2. Should the courts below have ordered the parties first to explore all alternatives to lay-off including those which would have added financial burdens to the municipality before resolving the conflict between the seniority provision and the affirmative action order?

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INTEREST OF THE AMICUS

The American Jewish Congress is a national organization of American Jews founded in 1918 and concerned with the preservation of the security and constitutional rights of all Americans. Since its creation, it has vigorously opposed racial and religious discrimination in employment, education, housing and public accommodations and has supported programs which would increase opportunities for disadvantaged minorities to speed the day when all Americans may enjoy full equality without regard to race.

STATEMENT OF THE CASE

In 1977, Carl Stotts, a black Memphis fireman, filed suit in the United States District Court for the Western District of Tennessee against the City of Memphis and the Memphis Fire Department. The suit, a class action, charged that the defendants had engaged in racially discriminatory hiring and promotional practices in violation of Title VII and 42 U.S.C. §§1981 and 1983.

In 1979, Fred Jones, another black Memphis fireman, filed a separate action alleging that he had been denied a promotion by the Department because of his race in violation of Title VII and 42 U.S.C. §1983. The district court consolidated the two actions and, in April 1980, a settlement agreement

was reached and was presented to the district court for its consideration. The agreement, which provided for promotions and back pay for certain individuals, also committed the City, which did not admit to having violated the law, to a long-term goal of increasing minority representation in each level of the Department to levels approximating the level of minority representation in the local labor force.[1] The agreement also established specific hiring and promotional goals. The hiring goal provided that qualified minorities should fill at least 50% of all vacancies; the promotional goal

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[1] The City had committed itself to this same goal in a consent decree entered into in 1974 with the United States in litigation involving allegations of Title VII violations in a number of city agencies, including the Fire Department.

stated that qualified minorities should fill 20% of the vacancies. The settlement agreement was silent with respect to layoffs, but did require that the trial court retain jurisdiction to make "such further order as may be necessary or appropriate to effectuate the purpose of this decree."

Notice of the proposed settlement was given by posting the decree in Memphis' fire station. Neither the Firefighters Union nor any class member filed any objections. A group of 11 non-minority firemen did object to the entry of the decree and moved to intervene. They claimed the decree constituted reverse discrimination and that there were alternative forms of relief, particularly with respect to

promotions, which were less burdensome for non-minority employees. Among the specific alternatives proposed were the creation of additional positions for promotion, organizational restructuring of the Department, constructive promotion, and the payment of monetary damages to non-minority employees affected by the decree. At a hearing held on the motion to intervene, the intervenors sought a delay in the approval of the promotional section of the decree in order to permit them to develop concrete alternative remedies.

The court denied the motion to intervene and approved the proposed decree. Based on evidence in the record, the court took judicial notice that the City's past employment practices were discriminatory and

determined that the proposed settlement, the "1980 decree" was reasonable.

One year later, the City announced that a deficit in the City's projected operating budget would necessitate personnel reductions in non-essential services. The proposed layoffs, the first in the City's history, would be based on an individual's city-wide union seniority in accordance with a memorandum of understanding between the City and the Union, with the Mayor retaining ultimate authority to determine which job classifications would be subject to layoffs. On the day the City made its public announcement, the plaintiffs obtained a TRO restraining the City from laying

off or reducing in rank any minority employee in the Memphis Fire Department.

At an evidentiary hearing held on plaintiff's application for a preliminary injunction, the court ruled (1) that the announced layoffs and demotions were an unanticipated changed circumstance not provided for in the 1980 decree; (2) that that decree was designed to correct the effects of the City's hiring and promotional practices, and (3) that the proposed layoffs would have a devastating effect on minority employment and on the progress made under the consent decrees. The court also ruled that the layoff policy would have a discriminatory impact and that the seniority system was not bona fide.

The court directed that the City not apply the citywide seniority policy insofar as it would decrease the percentage of minority employees then employed, in certain job categories (A-76). The Court added:

> Now, that may require two seniority lists, but frankly, I don't think that is so bad when you realize that the present situation resulted from prior discrimination, which is obvious.
>
> Now, I am sure that this is going to create problems, and I'm sorry for that. But at the same time, the Court believes that the City should file a proposed plan for not violating the Court's injunction.
>
> Now, I still maintain that I do not have authority to order that no members of the Union be laid off....
>
> In summary, I want the attorneys for the Plaintiff to prepare, within the next week, proposed findings... and then a proposed form of injunction which the Court will consider and sign....

> Now, the injunction should direct the City to propose another layoff policy or an amendment to their current policy. (A-76)

The City thereafter proposed a modified seniority plan under which reductions in force would still be based on seniority, but junior black employees in seven job classifications were protected so as not to reduce the percentage of minority employees in those classifications. The court entered an order approving the City's proposal.

The City and the Union appealed. The Court of Appeals for the Sixth Circuit affirmed. It ruled that the 1980 decree was the result of good faith, arms-length negotiations, and

that the trial court's determination that the decree was fair and reasonable was appropriate.

The court further held that the proposed intervenors' attack on the decree was impermissible and that the costliness of alternatives proposed by them would be inimical to the policy of encouraging settlement of Title VII actions.

With respect to the modification of the consent decree, the court held that that was appropriate on basic contract principles permitting specific enforcement to achieve the goals of the decree and on the ground of changed, unanticipated circumstances. Finally, the Court of Appeals ruled that, while the district court had erred in ruling that the seniority system was not bona

fide, the court had not abused its decision in modifying the decree even though the modification would conflict with the provisions of a collective bargaining agreement.[2]

The fiscal difficulties of the City having been resolved, all employees adversely affected by the 1981 layoffs have now been recalled to work and reinstated to their former positions.

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[2] Three rationales were offered for this ruling: (1) the "settlement" theory; (2) the theory of EEOC v. American Telephone and Telegraphic Co., 419 F.Supp. 1022 (E.D.Pa. 1976), -aff'd, 556 F.2d 167 (3d Cir. 1977); and (3) the theory of Sisco v. J.S. Alberici Construction Co., Inc., 655 F.2d 146 (8th Cir. 1981).

SUMMARY OF ARGUMENT

This case presents the painfully difficult question of who should bear the cost of layoffs resulting from a city's unanticipated budget crunch.[3] On the one hand, laying off minority workers hired in increased numbers under a court-ordered affirmative action program is inconsistent with our nation's commitment of the highest order to eradicate all vestiges of discrimination. On the other hand, laying off employees out of sequence required by bona fide seniority provisions embodied in a collective bargaining agreement and protected against challenge by Title VII is inconsistent with senior employees'

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[3] Amicus believes that the case is now moot and adopts the Respondent's substantive arguments regarding mootness.

contract rights, the preservation of which also reflects a strong public commitment.

Upon the assumption that it was required to resolve the stark conflict between these competing values, the court ruled that it was empowered to modify the consent decree, override the seniority agreement, and approve a species of dual seniority.

Given the court's basic assumption, its decision can be justified as a matter of law, as we argue below. But we believe the resolution of the conflict in such stark terms was an inappropriate way to approach the issue. Rather, alternatives to avoid the conflict between seniority rights and preservation of the court's decree should have been fully explored.

Indeed, the district court did request that the City devise a method to preserve the progress made under the 1980 decree in light of the City's fiscal problems, but the court never really followed through on this request.

We submit that the courts below should have imposed upon the parties the obligation of devising and exploring such alternatives, and, if no satisfactory proposal was advanced by the parties, the court should have determined on its own whether less painful and more equitable alternatives were available.

Work sharing plans, reduced work weeks, elimination of overtime, payless holidays, rotational layoffs, attrition plans or other possibilities short of

layoffs or demotions were never explored or evaluated by the parties or by the court.

We submit further that the fiscal difficulties faced by the City of Memphis were not an unalterable given. The courts below never had determined whether the City's claimed financial problems were real ones. Moreover, even if the City's fiscal shortfall was genuine, the courts had the legal power to, and should have, compelled the raising and expenditure of monies, if necessary, to protect the constitutional and other rights of the minority employees embodied in the affirmative action order, and to carry out the City's obligations under the

seniority provisions of its collective bargaining agreement with its employees.

ARGUMENT

Introduction

The American Jewish Congress believes that the orders appealed from were well within the equitable discretion of the court, and are barred by neither Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, nor the Constitution. The orders below were within the district court's discretion for the ultimate and "highest priority" is the eradication of discrimination and "the discriminatory effects of the past." Franks v. Bowman, 424 U.S. 747, 763 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

However, the district court should have required the parties to explore, or should itself have explored, means

of avoiding the head-on clash between seniority protections and the minority rights guaranteed by Title VII. Such means were in fact available, since the laid-off workers have now actually been reinstated.

This Court should now settle the law by requiring the federal courts in matters of this kind to explore and, if necessary, to direct alternative approaches. Such approaches can include, in our view, retrenchment, reallocating available resources, worksharing and the like, or even superseding local or state laws regarding municipal expenditures where necessary to preserve constitutionally protected anti-discrimination rights and valuable seniority rights.

POINT I

THE MODIFICATION WAS WITHIN THE EQUITABLE DISCRETION OF THE COURT.

A. Equitable Principles Permit Overriding Literal Application Of The Seniority Provisions.

The district court in this case confronted one of the most troubling dilemmas facing our society today: how to distribute the pains of recession and fiscal austerity so as to prevent reversal of the modest gains made in the struggle against discrimination while not unfairly burdening innocent members of non-minority groups.

Recession hurts many people, but minorities suffer the most. Because our nation has only recently undertaken to redress centuries of segregation and discrimination, minorities have the shortest length of service and when fiscal restraints force cutbacks, they

are the first to be laid off. "Layoffs by seniority 'lock in' the effects of past discrimination by continuing the advantage white males gained in employment by not having to compete with women and minorities." United States Commission on Civil Rights, Last Hired, First Fired: Layoffs and Civil Rights 36 (1977).[4]

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[4] The Commission found that fiscal cutbacks caused by the 1974-75 recession had a devastating effect on minorities in local government:

> The recent recession has had a critical impact on minorities and women. Many had only recently obtained their first promising jobs. Increasing numbers had begun to penetrate employment areas of great importance in our society, such as State and local government. Because they have not had time to acquire adequate seniority, however, minority members and women have been affected disproportionately by the personnel cutbacks occasioned by this recession, and much of their limited progress has thereby been obliterated. In

If unemployment remains high, and the "last hired, first fired approach continues to be widely followed, the modest progress achieved under Title VII and the Constitution in eliminating employment discrimination and its effects will be undone. See id. at 60-61.

> light of dismal predictions of slow economic recovery and continuing high unemployment, this recession threatens to lock these groups into place as a permanent, expendable economic and social underclass.
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> * * *
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> In New York City, layoffs in mid-1975 of 371 female officers appointed since January 1973 by the New York City Police Department ended their brief tenure with the previously overwhelmingly male police force. Over half of all Hispanic city workers in New York lost their jobs between July 1974 and November 1975.

Last Hired, First Fired, supra, at 60-61, 25-26.

There may be no painless options, however, and in the end someone may have to pay a price. Even if conventional seniority governs and older white workers keep their jobs, the more recently hired blacks will lose theirs. There is no objective calculus by which to calibrate which group would suffer more from such layoffs, and no criteria by which to judge whose suffering is more unfair or painful.

Certain basic governing principles are, however, clear.

(1) The eradication of discrimination and "the discriminatory effects of the past," Albermarle Paper v. Moody, supra, 422 U.S. at 418 (1975), is the "primary objective" of Title VII, Franks v. Bowman, supra 424

U.S. at 768 n.28, and represents a national commitment of the "highest priority." Id. at 773.

(2) District courts are empowered under §706(g) with "wide discretion ... to fashion the most complete relief possible," Franks v. Bowman, supra, 424 U.S. at 785; Int'l Bd. of Teamsters v. United States, 431 U.S. 324, 361, 365 n.51 (1977), in order to "allow the most complete achievement" of that "highest priority." Franks v. Bowman, supra, 424 U.S. at 770-71. This discretion includes the authority to modify a still-operative decree when circumstances change, in order to preserve and promote its purposes. United States v. United Shoe Corp., 391 U.S. 244 (1968); United States v. Swift, 286 U.S. 106, 119 (1932); cf.

Wright v. City of Emporia, 407 U.S. 451 (1972). If the original decree was legitimate, then a modification to prevent its undoing is equally legitimate.

(3) Seniority is a very important value. It is not a vested right, however, only an expectation, Franks v. Bowman, supra, 424 U.S. at 778-79; Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), and it is frequently overriden or modified to protect other interests, including the eradication of the effects of discrimination.

The first two points are well-established and need little discussion. The third, however, warrants some elaboration.

"This Court has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest." Franks v. Bowman, supra 424 U.S. at 778. Overcoming the effects of racial discrimination has also justified an override of seniority expectations, Id. at 779, either through "constructive seniority as in Franks, or by agreement. United Steelworkers v. Weber, 443 U.S. 193, 198-99 (1979); Savannah Printing Specialities v. Union Camp Corp., 350 F.Supp. 632 (S.D.Ga. 1972). Seniority may also be overridden by special preferences for union chairmen and other union officials. Aeronautical Lodge v. Campbell, 337 U.S. 521 , 526-27 (1949).

Indeed, seniority systems include so wide a variety of definitions, restrictions, conditions, and qualifications, and vary so greatly as to when seniority begins, how it is lost, what it covers, what it is subject to, how it is accumulated, and more,[5] that modifying a particular system to prevent reversal of some modest gains for a federal policy of the "highest priority," seems well within a court's equity discretion. Indeed, a statute or a voluntary union-employer agreement could so modify it. United Steelworkers v.

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[5] See Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532, 1534 (1962); American Tobacco Co. v. Patterson, 102 S.Ct. 1534, 1536 (1982) (promotions based on seniority plus certain qualifications); California Brewers Ass'n v. Bryant, 444 U.S. 598, 606-08 (1980).

Weber, supra, Tangren v. Wackenhut, 480 F.Supp. 539 (D.Nev. 1979), aff'd, 658 F.2d 705 (9th Cir. 1981), cert. denied, 102 S.Ct. 1771 (1982); Savannah Printing Specialities v. Union Camp Corp., supra.

Of course, seniority should not be lightly overridden. As the cases cited by Petitioners indicate,[6] seniority has a very high value. For that very reason, the courts below had an obligation, as a matter of law, which was not fulfilled--i.e., to explore and direct the implementation of other alternatives. Indeed, we believe the

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[6] The cases are distinguishable, however. For example, in Ford Motor Co. v. EEOC, 102 S.Ct. 3057 (1982), the danger was that seniority would be adversely affected before discrimination was proven; here, the trial court took judicial notice that there had been discrimination.

courts below had the power and obligation to find and spend funds it claimed it did not have, if necessary.

B. The Courts Below Should Have Given Further Consideration To Alternatives.

Before Memphis was required or permitted to layoff firefighters on a racial basis, the district court should have required a showing that there were no alternatives, such as those suggested below, to the use of racially-based dual seniority lists.

Perhaps none of these alternatives standing alone would have been sufficient to prevent all layoffs. Taken together, they might have substantially reduced the need for layoffs, perhaps to the point where the racial impact was not so devastating that it need have been "cured" at all. Perhaps none of these alternatives would have worked. But if that is so, then the race-based layoffs would at

least have been--and been perceived as--the least restrictive alternative, a prerequisite under University of California Regents v. Bakke, 438 U.S. 265 (1978), and Fullilove v. Klutznick, 448 U.S. 448 (1980), for the use of racial criteria.

That alternatives be considered is a requirement not only of federal constitutional law, but stems from the mandate of Title VII itself. The decision to reduce costs by means of layoffs, as opposed to the use of other cost-cutting alternatives,[7] is itself a

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[7] In NAACP v. D.P.O.A., 525 F.Supp. 1215 (E.D. Mich. 1981), black police officers sued the police union for not considering givebacks as an alternative to last hired, first fired layoffs, which would impact most heavily on newly hired blacks. The theory was breach of the duty of fair representation owed minority employees. The union defended citing the seniority provisions of Title VII. The Court refused the

decision about "the terms and condition of employment" subject to the rule of Griggs v. Duke Power Co., 401 U.S. 424 (1971), that an employment decision which has a disparate impact on minorities is illegal,[8] unless justified by business necessity. See Blumrosen & Blumrosen, The Duty to Plan For Fair Employment Revisited: Work Sharing In Hard Times, 28 Rugers L. Rev. 1082 (1975); (hereafter Duty to Plan); Summers and Love, Work Sharing As An Alternative to Layoffs By Seniority: Title VII Remedies in

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union's motion to dismiss, and set the matter for trial.

8 The New York City Commission on Human Rights in 1975 issued an "interpretive memo" stating that employers were under a legal duty to explore alternatives to "last hired, first fired" layoffs which had a disparate impact on minorities.

Recession, 124 U. Penn. L. Rev. 893 (1976); (hereafter Recession Remedies).[9]

Numerous alternatives have been suggested by the commentators as an alternative to last hired, first fired layoffs as a means of reducing labor costs. Of course, as we argue

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9 Additional authorities who support exploration of alternatives in place of last hired, first fired layoffs include: Stacy, Title VII Seniority Remedies In A Time of Economic Downturn, 28 Vanderbilt L. Rev. 4876 (1975); Silbergold, Title VII & the Collective Bargaining Agreement: Seniority Under Fire, 49 Temple L. Q. 288 (1976); Fix, Plant Seniority & Minority Employees: Title VII's Effect on Layoffs, 47 Col. L. Rev. 73 (1976); Elkiss, Modifying Seniority Systems Which Perpetuate Past Discrimination, 31 Labor L. Jnl. 37 (1980); Wood, Equal Employment Opportunity and Seniority: Rights In Conflict, 26 Labor L. Jnl. 3345 (1975); Thorp, Racial Discrimination and Seniority, 23 Labor L. Jnl. 398 (1972); Waerdt, Affirmative Action and Tenure, 11 Jnl. L. and Educ. 507 (1982).

elsewhere in this brief, Point C, infra, it is not clear that Memphis should be permitted to use its lack of funds as a basis for shifting the burden of remedying its illegal actions. But even if it were, use of these alternatives in this case would have eliminated the adverse impact on newly hired minority officers, and would have also eliminated the need for race based layoffs to the disadvantage of white employees. While these alternatives would not have been cost free, they would have avoided or minimized the need for consideration of race, a uniquely onerous burden under the Constitution.

Two distinct types of alternatives suggest themselves. First, the district court should have explored the

possibility that a reallocation of funds from other municipal activities--or other aspects of the Fire Department budget--would have eliminated or reduced the need for layoffs of fire department employees. Perhaps, too, the "crisis" would have resolved itself simply through normal attrition.

Second, even if it was determined that layoffs of firefighters were necessary, the court should have considered alternatives which spread the effect of the layoffs more broadly, and which, consistent with the basic thrust of §703(h), did not subordinate the rights of older white workers to minority workers. The alternatives of this type which at least should have been examined by the district court and the parties include:

(a) Worksharing--that is, the imposition of reduced hours for all employees, so that all might retain most of their income. This practice is widespread in several industries, notably the needletrades and furniture, as a means of allocating scarce work and fairly distributing hardships. Other instances of it have been reported. See, e.g., ¶443.59 F.E.P.; (Diamond International Corp.); N.Y. Times May 18, 1975 §4, at 8, col. 2 (N.Y. Telephone).

There have, indeed, been numerous arbitration decisions addressing the question of whether worksharing is inconsistent with collective bargaining agreements calling for last hired, first fired layoffs. The results are mixed,

Recession Remedies, supra, 124 U. Penn. L. Rev. at 903 n.32, but the trend is towards finding no inconsistency.

While it has been found that worksharing is feasible only when the work week remains at 30-32 hours, Wines, Seniority, Recession and Affirmative Action: The Challenge for Collective Bargaining, 20 Amer. Bus. L. J. 371 (1982), that is not an obstacle in this case, where a relatively small percentage of the firefighters were laid off.[10] Worksharing in the context of municipal services is not unprecedented. The U.S. Civil Service Commission report, Last Hired, First Fired: Layoffs and Civil Rights (1977), notes

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10 Wines also cites studies showing that 20 percent of collective bargaining agreements in effect in 1973 called for work sharing. This percentage reached 67 percent in the furniture industry.

that the Detroit Police Department resorted to payless days to avoid the need for layoffs of minority workers.

(b) Rotating Layoffs--Some have suggested that all employees be laid off for short periods of time, instead of indefinite layoffs of a few. There are several advantages of this scheme over long term layoffs--most notably that each employee retains health insurance and pension benefits. Moreover, because the layoff is total (as is not the case with worksharing) employees are eligible for unemployment insurance, thus reducing the financial pinch imposed.

(c) Givebacks--The parties could have considered cutbacks in salaries and fringe benefits (particularly vacations and personal days) with the savings used

to retain other employees. Such renegotiations of union contracts are today hardly uncommon.

(d) Early Retirement--The City might have been ordered to explore the possibility of making early retirement more attractive to older workers. One of the particular drawbacks of the scheme ordered by the district court is that the workers most likely to have benefitted from the prior discrimination are not those laid off, while those who competed against blacks fairly are laid off. Making early retirement attractive (as by allowing fictional service credits) would allow for the preservation of jobs for those people who did compete fairly, and would place

the costs of discrimination where they ought to be--on Memphis and its taxpayers.

Another advantage of early retirement is that it ameliorates one of the worst features of seniority-based layoffs--the discharging of young vigorous workers instead of older, more settled ones. This alternative would make permanent the minority percentage gains in the Fire Department, and would end the need for "quotas" at an earlier date.

(e) Restriction on Overtime--If Memphis has some of its firefighters working scheduled overtime at premium pay, its elimination might save sufficient funds to avoid at least some layoffs. Of course, the nature of firefighting work is such that not all overtime could be eliminated.

(f) Voluntary Layoffs (Leave)--Some employees might want to take additional time off, whether for a few days or for several months.

(g) Damages--There is one other possibility which has not received adequate attention--that of ordering Memphis to pay damages to white officers laid off to maintain a complement of black officers. McAleer v. A.T.T., 416 F.Supp. 435 (D.D.C. 1976), relying on Chief Justice Burger's concurring opinion in Franks, held that such relief was appropriate. McAleer is attractive because it places the onus of correcting past discrimination on the guilty parties--in this case, Memphis and it taxpayers.[11]

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[11] Discussing the proposed intervenors' suggestion that the trial court should have originally awarded compensatory relief to

C. An Asserted Lack of Funds Should Not Have Been Permitted To Override Either The 1980 Decree or Seniority Rights.

The dilemma which this case presents arises from a conflict among three different policies and principles: the federal anti-discrimination policy, the seniority principle, and the cost-cutting policy adopted by the City of Memphis in response to its fiscal problems. The courts below resolved

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non-minority employees, the Court of Appeals stated that the increased costs would destroy a primary incentive to settlement and thus would be inimical to the policy encouraging settlements embodied in Title VII. Whatever the merits of the Court of Appeals' view in the context of the original settlement, the argument does not undercut the amicus' argument here. While encouraging settlement is surely a valid Title VII goal, there are equally or more important values embodied in Title VII and the Constitution, among them, fairness and the use of non-racial criteria for employment decisions by employers.

this case by looking only at the clash between the first two policies; the third was viewed, implicitly, as beyond examination, perhaps because those courts believed they were powerless to order relief which would involve spending monies which the City claimed it did not have. In that, they erred.

It is a maxim that constitutional rights may not be denied for lack of funds. See, e.g., Bounds v. Smith, 430 U.S. 817, 824-25 (1977). A federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury. Quern v. Jordan, 440 U.S. 332, 337 (1979); Edelman v. Jordan, 415 U.S. 651

(1974).[12] See also Milliken v. Bradley, 443 U.S. 267 (1977) (affirming order of district court compelling state to pay for purchase of school buses as part of court ordered desegregation plan).

State law may not frustrate the operation of federal law even though the state legislature in passing its law had some purpose in mind other than frustration. Perez v. Campbell, 402 U.S. 637 (1971). State policy must give way when it operates to hinder vindication of federal constitution guarantees. North Carolina State Board of Education v. Swann, 402 U.S. 43, 45 (1971). A fortiorari, a municipality's

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[12] The Eleventh Amendment stands as no bar. See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

decision as to how to balance its budget must yield when necessary to protect federal constitutional rights.

Federal courts have under certain circumstances suspended the effectiveness of state or local policies or laws which have interfered with the implementation of court decrees. Thus, in Gautreaux v. Chicago Housing Authority, 342 F.Supp. 827 (N.D.Ill. 1972), aff'd, 480 F.2d 210 (7th Cir. 1973), cert. denied, 414 U.S. 1144 (1974), the City Housing Authority, under court order to increase the supply of housing as part of a desegregation plan, submitted proposed sites to the Chicago City Council as required by statute. When the Council refused to approve or even consider housing sites which the Authority had submitted, the

court, finding that this had the effect of thwarting "correction of federal constitutional wrongs," suspended the statutory requirement of Council approval and replaced it with another approval mechanism.

Similarly, in the course of Mississippi prison litigation, after the court prohibited acceptance of more prisoners in an overcrowded penitentiary, the state passed a statute requiring acceptance of all prisoners, and the court thereupon issued a TRO against its enforcement. Gates v. Collier, 407 F.Supp. 117 (N.D.Miss. 1976), aff'd, 548 F.2d 1241 (5th Cir. 1977).

The City's decision to reduce its payroll expenditures could also have been overridden if necessary to

accomplish the aims of the decree. The federal courts have power to issue financing orders to secure individuals' constitutional rights to equal protection. In Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 233 (1964), this Court said:

> [T]he District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia.

Cf. Virginia v. West Virginia, 246 U.S. 565 (1918) (discussing mandamus of state legislature to levy a tax to satisfy a judgment recovered by sister state). See generally Comment, Enforcement of Judicial Financing Orders: Constitutional Rights in Search of a

Remedy, 59 Geo.L.J. 393 (1970). But see United States v. County of Clark, 95 U.S. 769 (1874) (where county is taxing at maximum rate, mandamus cannot issue); Louisiana v. Jumel, 107 U.S. 711 (1883) (mandamus will not be issued for the release of money in the state treasury, without authorization and appropriation); Clay County v. McAleer, 115 U.S. 616, 618 (1885) (court cannot order taxing board to levy a tax in excess of maximum allowed where such tax is not enough to pay the judgment); United States v. County of Macon, 99 U.S. 582 (1879) (mandamus will not lie to compel the levy of a tax beyond the authorized amount).

While it is true that recent cases demonstrate that the courts are hesitant to order states or their political

subdivisions to raise and allocate sums of money and will explore all alternatives to such orders, including the shutting down of the offending institutions, see, e.g., Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1975); Welsch v. Likins, 550 F.2d 1122 (8th Cir. 1977); New York State Ass'n for Retarded Children v. Carey, 631 F.2d 162 (2d Cir. 1980), it must be true, for the Supremacy Clause demands no less, that if such alternatives do not exist or would not be effective to remedy the Constitutional violation, the court is empowered to compel the state or local governments to raise and spend such

funds as are necessary to remedy the violation. See Griffin v. County School Board of Prince Edward County, supra.[13]

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13 The City's financial problems apparently have been resolved and the City now appears to be in excellent financial health. In 1983, the voters approved a sales tax increase; the property tax rate has been reduced. This demonstrates that when more flexible alternatives are considered, methods can be devised for avoiding the painful conflict created by the clash between the principles underlying affirmative action and seniority.

CONCLUSION

For the above stated reasons, if the case is not moot, the judgment below should be affirmed, but the order of the District Court should be modified to require consideration of alternate solutions in the event a conflict between the anti-discrimination remedy and seniority rights should arise in the future.

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Nos. 82-206 and 82-229

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

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Petitioners,

v.

CARL W. STOTTS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AMICUS CURIAE, IN SUPPORT OF PETITIONERS

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QUESTION ADDRESSED

The judgment at issue herein set aside a neutral city-wide seniority system and substituted a racially segregated seniority system in order to preserve one minority's current "share" of various job categories in the Memphis, Tennessee fire department. The question addressed in this brief is whether the district court erred as a matter of law in entering a preliminary injunction prohibiting the Memphis Fire Department from conducting lay-offs according to the city-wide seniority system, where

(a) there was no adjudication of past discrimination and no indication that the parties to a 1980 consent decree that the court purported to be interpreting had intended to modify the existing seniority system, and the only basis for the order was the court's view that the "purpose" of the consent decree had been to achieve and maintain racial proportionality in all fire department job categories;

(b) where there was no valid finding that the seniority system was not *bona fide*, that the lay-offs were racially motivated or that racial discrimination in promotion and hiring continued to exist; and

(c) where there was no indication that the black fire personnel accorded retroactive seniority by the preliminary injunction had been victims of discrimination in the past.

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CONSENT OF THE PARTIES

Petitioners and Respondents have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Anti-Defamation League of B'nai B'rith was organized in 1913 as a section of B'nai B'rith, the oldest civic service organization of American Jews, to advance good will and mutual understanding among Americans of all creeds and races and to combat racial and religious prejudice in the United States. The Anti-Defamation League is vitally interested in protecting the civil rights of all persons, be they minority or

majority, and in assuring that every individual receives equal treatment under the law regardless of his or her race or religion.

Among its many other activities directed to these ends, the Anti-Defamation League has in the past filed amicus briefs in this Court urging the unconstitutionality or illegality of racially discriminatory laws or practices in such cases as *e.g.*, *Shelley* v. *Kraemer*, 344 U. S. 1 (1948); *Sweatt* v. *Painter*, 339 U. S. 629 (1950); *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *Colorado Anti-Discrimination Comm'n.* v. *Continental Air Lines, Inc.*, 372 U. S. 714 (1963); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968); *Sullivan* v. *Little Hunting Park*, 396 U. S. 229 (1969); *San Antonio Ind. School Dist.* v. *Rodriguez*, 411 U. S. 1 (1973); *De Funis* v. *Odegaard*, 416 U. S. 312 (1974); *Runyon* v. *McCrary*, 427 U. S. 160 (1976); *McDonald* v. *Santa Fe Trail Transport Co.*, 427 U. S. 273 (1976); *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978); *County of Los Angeles* v. *Davis*, 440 U. S. 625 (1979); *United Steelworkers of America* v. *Weber*, 443 U. S. 193 (1979); *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980); and *Boston Police Patrolmen's Ass'n, Inc.* v. *Castro*, 51 U.S.L.W. 4566 (1983).

The Anti-Defamation League shares the concern of the courts below that all levels of public employment be integrated to reflect the heterogeneous nature of our society. Alternatives supported by the Anti-Defamation League to achieve this result include outreach programs to identifiable underrepresented minorities, special training and educational assistance for deprived applicants, and the consideration of merit-based alternatives to strict seniority systems. The Anti-Defamation League cannot accept, however, the concept adopted in the decision below that each ethnic group is entitled to proportional representation in each category of public jobs. Such a concept is wholly contrary to the basic constitutional principles that all persons are entitled to freedom from discrimination directed against them on grounds of race, religion, creed, sex or national

origin, and that each person has a right to be judged on the basis of his or her individual merits—not on the basis of the ethnic or racial group to which he or she belongs. It is these fundamental principles that form the basis for our argument for reversal of the decision below.

STATEMENT OF THE CASE

In 1974, the United States Department of Justice brought suit against the City of Memphis alleging that it had violated Title VII, 42 U. S. C. § 2000e *et seq.*, by engaging in a pattern and practice of race and sex discrimination in hiring and promoting city employees. The case was settled that same year by a consent decree pursuant to which the City agreed to "undertake as its long term goal, subject to the availability of qualified applicants, the goal of achieving throughout the work force proportions of minority and female employees in each job classification approximating their respective proportions in the civilian labor force." To achieve this goal for black employees, the City agreed to attempt to fill at least 50% of all vacancies with qualified black applicants. Insofar as promotions, transfers and assignments were concerned, the decree required the City to compute every employee's seniority based on the person's total seniority in jobs with the City. (App. to Pet. for Cert. A 55, A 56.)

In 1977, respondent Carl W. Stotts filed a class action against the Memphis Fire Department alleging that, despite the 1974 decree, the department's hiring and promotion practices still violated Title VII, 42 U. S. C. § 1981, and 42 U. S. C. § 1983. The *Stotts* case was later consolidated with a similar action brought by Fred L. Jones individually, alleging that his failure to receive a promotion within the fire department was the result of racial discrimination.

In 1980, the parties to the *Stotts* and *Jones* cases entered into a consent decree. In so doing, the fire department specifically denied liability, stating that it did "not thereby admit any violations of law, rule, or regulation with respect to the allegations made by plaintiffs in their complaints." (App. to Pet. for Cert. A 60.)

The stated intent of the 1980 consent decree was "to parallel and supplement the relief" provided in the 1974 decree. (*Ibid.*) Thus, the same long-term goal of proportional representation was restated, as was the 50% interim black hiring quota. In addition, in the 1980 decree the fire department adopted the goal of promoting black applicants for positions above entry-level job classifications in proportion to their representation in the applicant pool, setting a promotion goal of at least 20% black promotions annually for each civil service classification or uniformed rank. The decree also provided for certain promotions and awarded $60,000 in back pay to named individuals. The 1980 decree did not grant retroactive seniority to anyone and indeed did not even refer to the city-wide seniority system the City was required to use under the 1974 decree. Nevertheless, the decree did provide that it was not intended to conflict in any way with the earlier agreement. (*Id.* at A 60, A 64-66.)

In May, 1981, the City of Memphis announced that it was experiencing financial difficulties that would require a reduction in personnel in certain city jobs for the 1981-1982 fiscal year. The City stated that it would lay off employees on a last-hired, first-fired basis, with seniority determined by length of service with the City. Because many of the jobs being eliminated were higher ranking positions, senior employees were given the right to "bump" employees in lower ranking positions rather than being laid off. Thus, although higher-ranking jobs were being eliminated, the ability to drop down to the lower ranks meant that the employees actually laid off were ordinarily those in the lower ranks with the least seniority. This system of laying off

employees was consistent not only with the city-wide seniority system required by the 1974 consent decree, but also with a Memorandum of Understanding between the City and the union representing the firefighters, Local 1784 of the International Association of Fire Fighters.

Before the layoffs went into effect, respondents obtained a temporary restraining order that prohibited the fire department from reducing in rank any black employee. At the hearing on respondents' motion for a preliminary injunction to confirm this relief, evidence was presented showing that since 1974 the minority hiring goal of 50% had been met or exceeded and that 16% of the employees promoted in that period had been black. In addition, the overall representation of blacks in the fire department had increased from 3%-4% to approximately 11%, though it was still far below the number of black workers in the labor force generally. If the layoffs had been carried out as originally planned, the overall percentage of black employees in the fire department would have declined by only one percent. However, black employees generally had less seniority in higher-ranking job categories, and thus 60% of the employees affected by the demotions would have been black.

After hearing the evidence, the district court granted respondents' motion, enjoining the defendants from demoting or laying off any black employees in certain job categories if the effect would be to decrease the proportion of blacks in that category. In entering this order, the district court first found that the 1980 consent decree did not contemplate the method to be used in laying off personnel. It then held that the lay-offs themselves were not decided upon as a result of a purpose or intent to discriminate, but that the *effect* of using a city-wide seniority system to lay off employees was discriminatory and hence that system was not *bona fide*. The court also stated that, while the City had never admitted discrimination in the consent decrees, it would be "naive" not to believe that there had been such discrimination. (Oral ruling granting preliminary in-

junction, App. to Pet. for Cert. A 73.) Indeed, based on the statistical evidence presented, the court went so far as to "take judicial notice of past racial discrimination in the Fire Department." (*Id.* at 74.) Under these circumstances, the court held that it had the power to enter an injunction to preserve the existing racial proportions in a wide variety of individual job classifications.

On appeal, the Sixth Circuit affirmed the grant of injunctive relief. *Stotts* v. *Memphis Fire Dept.*, 679 F. 2d 541 (1982). In its opinion, the court rejected the district court's holding that a discriminatory effect was sufficient to invalidate the facially neutral seniority system. *Id.* at 551 n.6. Nevertheless, it found that the district court was justified in overriding that system in order to achieve the purposes set forth in the 1980 decree. Although the decree was admittedly silent on the issue of lay-offs, the court held that the fire department was under an affirmative obligation to prevent erosion in the progress toward racial proportionality that had already been achieved under the decree.

SUMMARY OF ARGUMENT

As the Sixth Circuit noted, in order to justify the issuance of a preliminary injunction, the movant must demonstrate a probability of success on the merits of the underlying claim and irreparable harm if the injunction is not issued. In addition, the movant must show that the harm from a refusal to issue the injunction will outweigh any harm that it might cause and that the issuance of the injunction is in the public interest. 679 F. 2d at 560. In this case, these tests clearly were not met and hence the trial court abused its discretion in issuing the order.

The Sixth Circuit erred in holding that the 1980 consent decree, coupled with the statistical evidence, demonstrated a probability of success on the merits of plaintiffs' claim. There

must be a jurisdictional basis for the issuance of a quota-type remedy in the form of either an agreement between the parties or a finding of liability. Here, it is clear that the fire department did *not* agree in 1980 to insulate minorities from the effects of necessary lay-offs. Nevertheless, the Sixth Circuit implied such an agreement based on the assumption that the purpose of the consent decree was to achieve and maintain racial proportionality in each and every fire department job category. In so doing, the court failed to follow a number of decisions by this Court holding that unbargained-for liabilities may not be imposed on parties to consent decrees based on the court's after-the-fact determination of the "purpose" of such decrees. See, *e.g.*, *United States* v. *Armour & Co.*, 402 U. S. 673, 681-82 (1971). In addition, the "purpose" on which the Sixth Circuit based its decision was clearly improper: while eliminating discrimination in hiring and promotion policies lies at the heart of constitutional and statutory civil rights guarantees, the use of quotas in the workplace, however benign their apparent intent, is repugnant to the basic concept of individual rights that underlie those guarantees.

Nor was there a proper finding of liability on which to base the court's grant of injunctive relief. The lower court's decision to take "judicial notice" of pre-1980 discrimination in hiring and promotion was clearly improper, as was the Sixth Circuit's holding that the department's pre-1980 employment statistics adequately indicate the probability of success on the merits. Furthermore, even if the plaintiffs could establish discrimination in hiring and promotions prior to 1980, that finding alone would not provide a basis for enjoining the functioning of the City's *bona fide* seniority system in 1981. If the court was attempting to fashion additional relief for pre-1980 discrimination through the use of retroactive seniority, it could only do so for the identifiable victims of past discrimination. *Bona fide* seniority systems are protected by Title VII even if they perpetuate the effects of past discrimination; thus, class-wide grants of retroactive seniority are clearly barred. *Inter-*

national Brotherhood of Teamsters v. *United States*, 431 U. S. 324 (1977).

On the other hand, if the court was not attempting to remedy past discrimination, it had no power to act simply to maintain racial balance. A court cannot intervene if, after racial discrimination has been eliminated, new circumstances not related to discrimination lead to a decrease in the number of minorities in a particular job category or in the work-force in general. *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424 (1976). Here, there has apparently been progress in the hiring and promotion of minorities; there has been no finding that discrimination in those areas had not been eliminated by 1981. Furthermore, the district court itself specifically found that the layoffs were not improperly motivated. Under these circumstances, the court had no power to abrogate a *bona fide* seniority system in order to protect the "progress" that had been made toward racial proportionality in various job categories.

The courts below also erred in balancing the harms and the public interest at stake in this proceeding. The injunction was issued to protect certain black employees from being demoted or laid off; there was no finding that any of these employees had been victims of discrimination in the past. Inevitably, the ruling injured white employees with more seniority who would not have been demoted or laid off but for the issuance of the injunction. By according retroactive seniority to black employees on a class-wide basis without reference to whether they were identifiable victims of discrimination and ignoring the concommitant harm inflicted on white employees solely because of their race, the courts below failed to perform "the delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing." *International Brotherhood of Teamsters* v. *United States*, 431 U. S. 324, 372 (1977).

ARGUMENT

I. The Lower Courts Erred In Finding That Plaintiffs Had Established A Probability of Success On The Merits.

A. Courts May Not Impose Additional Obligations On A Party To A Consent Decree Based On Their View Of The "Purpose" Of The Decree.

The courts below erred in finding that plaintiffs had established a probability of success on the merits of their case attacking the use of a *bona fide* seniority system to lay off fire department employees. In its decision, the Sixth Circuit relied primarily upon its determination that the preliminary injunction was necessary to implement promises made by the Memphis Fire Department to its minority employees in the 1980 consent decree. The Sixth Circuit implied such promises from the decree despite the fact that the fire department had never agreed to grant its minority employees special seniority rights or to protect them from the operation of its *bona fide* seniority system. To the contrary, the 1974 consent decree specifically provided that seniority for all employees "covered under this decree shall be computed as the total seniority of that person with the City." While the 1980 consent decree was silent on the subject of seniority, it provided that its provisions were not intended to conflict with any of the provisions of the 1974 decree.

Under these circumstances, the Sixth Circuit's reasoning must be rejected. The 1974 and 1980 consent decrees were entered into without any finding or admission of liability by the defendant. They represented a compromise in which the plaintiffs gave up their right to seek further relief and the defendant waived its right to litigate its various defenses. One aspect of this compromise was the unambiguous preservation of the defendant's *bona fide* seniority system.

The court had no authority to abrogate this compromise without at least giving the defendant an opportunity for a hearing on the question of liability. It is well settled that, absent such a hearing, a consent decree that was entered into prior to a finding or admission of liability may not be modified so as to impose additional new duties upon the defendant. Rather, the court administering the decree must respect the conditions upon which rights were waived and confine itself to the agreement to which the parties consented—even if the court believes that a different agreement would better effectuate the purposes of one of the parties to the decree.

As this Court explained in *United States* v. *Armour & Co.*, 402 U. S. 673, 681-682 (1971) (footnote omitted):

> "Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. ***Because the defendant has, by the decree, waived his right to litigate the issues raised,*** a right guaranteed to him by the Due Process Clause, ***the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.***" (emphasis supplied)

By requiring that the conditions upon which a defendant waived his right to litigate his liability be respected, this Court has prohibited unbargained-for duties from being written into a consent decree under the guise of construction. If the court or plaintiff believes that subsequent events have made the defendant's original promises inadequate to fulfill the purposes of the decree, the proper course is not to modify the decree to change the scope of the defendant's duties, as the courts did here, but rather to litigate the question of liability and then, depending upon the outcome, to fashion new relief on that basis. See *Flexibility and Finality In Antitrust Consent Decrees*, 80 Harv. L. Rev. 1303 (1967).

In *Hughes* v. *United States*, 342 U. S. 353 (1952), this Court made it clear that modification through such a retrial is the only proper course of action. There, the United States had entered into a consent decree, prior to trial, in which Hughes had agreed either to sell his stock in certain motion picture companies or to deposit the stock with a voting trustee. Hughes chose to make the deposit. Thereafter, the United States petitioned the district court to force Hughes to sell his stock in order to better effectuate the purposes of the decree. The district court granted the requested relief. This Court reversed, unanimously.

This Court noted that Hughes had never promised to sell his stock. As a consequence, absent an adjudication on the merits, the district court had no authority to order a sale, notwithstanding provisions in the decree reserving jurisdiction to amend and the inherent equity powers of the court:

> "We entertain no doubt concerning the District Court's power to require sale of Hughes' stock after a proper hearing.... But there has been no adequate hearing of this issue as to Hughes. Neither when the present order was considered nor when the original decree was entered where any findings of fact made to support an order of compulsory sale of Hughes stock. As previously

> pointed out the consent of Hughes did not include consent to make him sell. At every stage Hughes objected to the order forcing sale of his stock without a hearing that included evidence and a judicial determination based on it." *Id.* at 357-358.

See also *United States* v. *Atlantic Refining Co.*, 360 U. S. 19, 23 (1959) (Plaintiff's argument based on "purposes" of decree "does not warrant our substantially changing the terms of a decree to which the parties consented without any adjudication of the issue"); *United States* v. *Armour Co.*, 402 U. S. 673, 681 (1971) (Argument based on purposes of consent decree "might be a persuasive argument for modifying the original decree, *after full litigation* . . . .") (emphasis added); *Fox* v. *United States Department of Housing & Urban Development*, 680 F. 2d 315, 323 (3d Cir. 1982) ("To impose additional duties under the decree because of [certain foreseeable changed circumstances] is to disregard the basic rights of litigants who waive their right to litigate defenses by consenting to have a decree entered against them. The conditions upon which rights are waived must be respected.")[1]

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[1] In *Fox*, the plaintiff had entered into a consent decree with HUD, prior to any determination of liability, whereby HUD had agreed to provide plaintiff certain assistance in the construction or rehabilitation of various housing units. After the decree was entered, the plaintiff sought additional aid from HUD. When HUD refused, plaintiff successfully petitioned the district court for a construction and modification of the consent decree giving it additional aid essential to the housing project.

The Third Circuit reversed. The court noted that the terms of the decree did not cover the additional assistance and that "[t]he instrument must be construed as it is written . . . and not as one of the parties would have written it had it ultimately prevailed." *Id.* at 322. (citations omitted) The court then held that, absent a hearing on liability, the decree could not be modified so as to require additional aid from HUD because it would be improper to "impose additional duties upon a defendant party to a consent decree without an adjudication or admission that the defendant violated the plaintiffs' legal rights reflected in the consent decree and that modification is essential to remedy the violation." *Id.* at 323.

Similarly, in this case, the conditions upon which the fire department waived its right to litigate its defenses must be respected. Those conditions included the retention of the seniority system set forth in the 1974 decree. Absent some liability predicate, the district court had no power to modify the consent decree to impose additional new duties upon the fire department.

B. A Desire To Achieve Racial Balance Is Not A Permissible Purpose Of A Consent Decree.

Apart from the general prohibition on creating unbargained-for obligations based on the "purpose" of a consent decree, the Sixth Circuit erred by selecting as the purpose of the 1980 decree the creation of racial balance in the fire department. On its face, the decree was designed to eliminate discrimination in hiring and promotion. The decree used racial proportionality in the work-force as a long-term goal, based, no doubt, on the assumption articulated in *International Brotherhood of Teamsters* v. *United States,* 431 U. S. 324, 340 n.20 (1977), that even-handed hiring and promotion will eventually produce a racially balanced work-force. In its opinion, however, the Sixth Circuit took the concept of racial balance out of this limited context and made it into a separate purpose to be pursued for its own sake. In so doing, the court clearly erred.

The proposition that each identifiable ethnic and racial group is "entitled" to a proportionate share, and only that share, of public jobs is repugnant to the Constitution and civil rights laws. As this Court stated in *Furnco Construction Corp.* v. *Waters,* 438 U. S. 567, 579 (1978):

> "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." (Emphasis in original.)

Indeed, the legislative history of Title VII makes it clear that an agreement to achieve or maintain racial balance in the work-force for its own sake, not only is not required, but would in itself violate Title VII:

> "There is no requirement in Title VII that an employer maintain a racial balance in his workforce. *On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve the violation of Title VII* because maintaining such a balance would require an employer to hire or to refuse to hire on a basis of race. It must be emphasized that discrimination is prohibited as to any individual." (emphasis supplied). 110 Cong. Rec. 7213 (1964) (remarks of Senators Clark and Case).

Thus, even if the purpose of the consent decree in this case was not simply to end discrimination in hiring and promotion practices, but also to ensure proportional representation in various job categories in the work-force, that purpose could not properly form the basis for injunctive relief.

C. There Was No Finding Of Liability That Could Provide A Basis For An Injunction Abrogating A *Bona Fide* Seniority System.

In holding that plaintiffs had established a probability of success, both courts below appeared to be relying not only on the 1980 consent decree, but also on the notion that the plaintiffs could have demonstrated racial discrimination in hiring and promotion prior to 1980. Thus, the district court took "judicial notice" of the past discrimination and the Sixth Circuit stated that, based on the statistical evidence, plaintiffs could have made out a *prima facie* case of discrimination. In holding that this "evidence" demonstrated a probability of success on the merits of plaintiffs' attempt to abrogate the *bona fide* city-wide seniority system, the courts erred in at least three respects.

First, before a determination of liability was made, defendants, who had always denied the discrimination charges, were

entitled to a hearing on the issue. The remedial powers of the federal courts may "be exercised only on the basis of a violation of the law and [may] extend no farther than required by the nature and extent of that violation." *General Building Contractors* v. *Pennsylvania,* 102 S. Ct. 3141, 3154, 50 U. S. L. W. 4975 (1982). While it was not inappropriate for the district court to take judicial notice of the statistics concerning the racial makeup of the fire department, those statistics by themselves were insufficient to establish a finding of liability. See *Furnco Construction Corp.* v. *Waters,* 438 U. S. 567, 576 (1978) ("the Court of Appeals went awry . . . in apparently equating a prima facie showing under McDonnell Douglas with an ultimate finding of fact as to discriminatory refusal to hire under Title VII; the two are quite different. . . .") Although this case was at a preliminary injunction stage, surely the defendants were entitled to more consideration of whether they had violated the law than the trial judge's casual remark that it would be "naive" not to assume that discrimination had existed.

Second, and more important, even if there had been discrimination prior to 1980, that fact alone could not be used to justify the abrogation in 1981 of a *bona fide* seniority system. Such seniority systems are specifically protected by Title VII even though their operation has a disparate impact on minority employees and even though the disparate impact results from past discrimination in hiring. *International Brotherhood of Teamsters* v. *United States,* 431 U. S. 324 (1977); *American Tobacco Co.* v. *Patterson,* 456 U. S. 63 (1982).

The courts are permitted to disturb the operation of a *bona fide* seniority system only to the extent necessary to provide appropriate relief for the actual victims of discrimination. In *International Brotherhood of Teamsters* v. *United States,* 431 U. S. 324, 365 (1977), this Court specifically limited retroactive seniority to identifiable victims of discrimination. The Court thus held that a lower court decision to grant retroactive

seniority on a class-wide basis to every minority employee was improper; instead, this Court held that retroactive relief should have been limited to those persons who in the past had actually applied for employment and been rejected or who had been discouraged from applying because of the discrimination.[2]

As this Court's decisions subsequent to *Teamsters* have made clear, it is never proper to abrogate a *bona fide* seniority system or to force the layoff and demotion of employees to protect minority workers who have not shown themselves to be victims of past, proven discrimination. Any other rule would unfairly sacrifice "the rights and expectations of perfectly innocent employees." *Guardian Ass'n* v. *Civil Service Commission* 51 U. S. L. W. 5105, 5112 (1983) (White, J.), quoting from *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 787 (1976) (Powell, J.), and affront the basic principle "that Title VII requires employers to treat their employees as *individuals*, not 'as simply components of a racial, religious, sexual or national class.'" *Arizona Governing Committee* v. *Norris*, 51 U. S. L. W. 5243, 5245 (1983), quoting from *Los Angeles Department of Water & Power* v. *Manhart*, 435 U. S. 702, 708 (1978) (emphasis in the original).

Thus, even if there had been an appropriate finding of past discrimination in this case, such a finding could not provide a basis for the court's interference with the functioning of a *bona fide* seniority system.

Finally, the injunction at issue here was also beyond the courts' power if it was intended not to remedy past dis-

[2] Although the case at bar also involved a charge of discrimination in violation of 42 U. S. C. §§ 1983 and 1981, the same limits on the courts' power apply. As the Third Circuit stated in *Gurmankin* v. *Costanzo*, 556 F. 2d 184, 188 (3d Cir. 1977), "There is no distinction in the law of equitable remedies under Title VII and suits brought in reliance on 42 U. S. C. § 1983, or directly on the fourteenth amendment."

crimination, but rather to preserve the gains that had been achieved in reaching the "goal" of racial proportionality. In *Pasadena* v. *Spangler*, 427 U. S. 424 (1976), this Court dealt with a situation where schools desegregated by court order had become racially imbalanced once again through population shifts that had not been found to be the result of actionable discrimination. The Court held that a federal court had no power to issue a remedy designed to correct such an imbalance. In so holding, the Court relied on its earlier determination in *Swann* v. *Board of Education*, 402 U. S. 1, 24 (1971), that there is no "substantive constitutional right [to a] particular degree of racial balance or mixing." Thus, once the constitutional violation has been remedied, a court has no power to issue additional decrees in order to maintain racial proportionality.

The same analysis applies here. The district court specifically found that there was no purposeful discrimination in the lay-offs themselves, and there has been no finding that the City failed to eradicate discrimination in its hiring and promotion practices. Once the City of Memphis had cured its past practices of discrimination and had properly compensated identifiable victims of past discrimination, the court had no power to reach out beyond the terms of the consent decree to require the City to do more. To hold otherwise would be utterly inconsistent with *Spangler* itself, which denies any claimed constitutional right to racial balance. As noted above, it would also be inconsistent with the concept of individual opportunity that our Constitution and civil rights laws embody.

II. The Lower Courts Failed To Balance The Harms Appropriately.

The courts below also erred in finding that plaintiffs would suffer irreparable harm if the injunction was not issued and that that harm outweighed the burden imposed on innocent white employees when it was issued. Although it is true that certain black employees would have been injured if the injunction had not issued, the courts ignored the fact that, unless they were

victims of past discrimination, these employees had no right to protection from lay-offs under a *bona fide* seniority system. The courts also declined to recognize the significant burdens imposed on white employees who *did* have a legitimate expectation of protection under the seniority system. This was clearly error. As Justice Powell stated in his concurring opinion in *Fullilove* v. *Klutznick,* 448 U. S. 448, 514 (1980):

> "A race-conscious remedy should not be approved without consideration of an additional crucial factor—the effect of the set-aside upon innocent third parties."

In cases where this Court has approved race-conscious remedial programs, the "expectations" that were frustrated have involved an ability to compete for certain benefits such as new jobs, promotions, future contracts and the like. In those cases the Court has determined that any injury to white employees' expectations of future benefits has been offset by the need to counteract prior pervasive discrimination. Thus, in *United Steelworkers of America* v. *Weber,* 443 U. S. 193 (1979), white employees were foreclosed from applying for half of the openings in a new craft training program established specifically to remedy the past effects of segregation in certain job categories. The Court noted that white employees could still compete for the remaining half of the openings and that, in any event, the plan was "a temporary measure" to eliminate "conspicuous racial imbalance in traditionally segregated job categories." The plan did *not* require the "discharge of white workers and their replacement with new black hirees." Under these circumstances, this Court found that the plan did not "unnecessarily trammel the interests of the white employees." 443 U. S. at 208.

Similarly, in *Fullilove* v. *Klutznik, supra,* Congress had foreclosed white contractors from bidding on only 10% of new federal contracts worth $4 billion, with waiver provisions in the event that qualified minority contractors could not be found. In his concurring opinion, Justice Powell concluded that any

"marginal unfairness to innocent nonminority contractors is not sufficiently significant—or sufficiently identifiable—to outweigh the compelling governmental interest in redressing the [purposeful] discrimination that affects minority contractors." 448 U. S. at 515.[3]

Here, on the other hand, the burden imposed on individual employees merely because they are white is clear and immediate. To impose that burden solely because of the color of their skin for the purpose of protecting one racial group's supposed share of public jobs is clearly not permissible under our Constitution and civil rights laws. Nor is it in the public interest. For even if the intent is a benign one, the allocation of benefits and burdens on a quota basis is inevitably destructive, postponing rather than hastening the day "when no governmental decision will be based upon immutable characteristics of pigmentation or origin," *Fullilove* v. *Klutznick, supra,* 448 U. S. at 516 (Powell, J.). As Justice Powell observed in *University of California Regents* v. *Bakke*, 438 U. S. 265, 298 (1978):

> "[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."

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[3] In addition, it should be noted that neither *Weber* nor *Fullilove* involved a court-ordered remedy. *Weber* was a voluntary affirmative action plan; *Fullilove* involved the power of Congress under § 5 of the Fourteenth Amendment to spend federal funds in a way that would tend to redress past intentional discrimination. In both cases, the Court recognized that imprecision in the means of remedying the past discrimination could be tolerated.

Here, it is a court-ordered remedy that is at issue. It is well-settled that in framing an equitable decree, the district court must "tailor 'the scope of the remedy' to fit 'the nature and extent of the . . . violation' " proved. *Dayton Board of Education* v. *Brinkman*, 443 U. S. 406, 420 (1977); see also *General Building Contractors Ass'n., Inc.* v. *Pennsylvania*, 102 S. Ct. 3141, 3154, 50 U.S.L.W. 4975 (1982).

And as Professor Bickel stated in The Morality of Consent 133 (1975):

> "[A] racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can as easily be turned against those it purports to help. The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name but in its effect; a quota is a divider of society, a creater of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant."

CONCLUSION

The basis for the *amicus'* long-time opposition to racial quotas is made manifest by this case, where innocent employees have been forced out of their jobs on the basis of race. It is not enough to wish to correct racial injustice. The means used must not compound the evil that is sought to be remedied and must not go beyond the law and the Constitution to reach what is thought to be a just result for one class of people at the expense of others.

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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No. 82-206 and 82-229 (Consolidated)

IN THE

Supreme Court of the United States

October Term, 1983

FIREFIGHTERS LOCAL UNION No. 1784,
Petitioner,
v.
CARL W. STOTTS, *et al.*,
Respondent.

MEMPHIS FIRE DEPARTMENT, *et al.*,
Petitioners,
v.
CARL W. STOTTS, *et al.*,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE CITY OF DETROIT *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE CITY OF DETROIT *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS

This case raises questions regarding the ability of a district court to preserve gains achieved under a remedial decree when fiscal considerations require a municipality to achieve economies.[1] A crucial factor that should be considered by the Court is the operational need of public service agencies that have discriminated in the past to maintain adequate minority representation among their employees, in order to preserve public confidence. The City of Detroit has extensive experience with this problem and has been engaged in litigation concerning the operational needs of its police and fire departments.

The City of Detroit has suffered severe public safety problems as the result of prior discriminatory practices by its public safety agencies, and a failure to correct the effects of that discrimination. For the past nine years Detroit has implemented affirmative action programs to eradicate the effects of past discrimination against minorities and the debilitating effects of that discrimination on the ability of its public safety agencies to function effectively.

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[1] For the purposes of this brief, *Amicus* has assumed that the issues identified by Petitioners are properly before the Court. However, *Amicus* notes its agreement with Respondents that the case is moot as to the original complainants. Moreover, *Amicus'* own experience demonstrates that the questions do not fall within the narrow category of cases that are "capable of repetition, yet evading review." *See Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982). Public sector layoffs are not necessarily short-term. The City of Detroit has unfortunately found it necessary to engage in layoffs for extended periods. For example, Detroit laid off 690 police officers on September 5, 1980; more than half of them remain on layoff status. On January 12, 1979 the City laid off 97 firefighters; some of them were not recalled until March 22, 1982.

Presently pending are two cases brought on behalf of white police officers and one case brought by white applicants for firefighter positions which challenge the legality of the race-conscious affirmative action plans of Detroit's police and fire departments. In *Detroit Police Officers, Ass'n* v. *Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), the United States Court of Appeals for the Sixth Circuit reversed and vacated the judgment of the District Court for the Eastern District of Michigan, *see Detroit Police Officers' Ass'n* v. *Young*, 446 F. Supp. 979 (E.D. Mich. 1978), which had enjoined operation of that part of the City's affirmative action plan which had imposed a 50/50 black-white ratio for promotion to the rank of sergeant. The case was remanded to the District Court for further findings of fact and consideration of constitutional issues in light of the standards set forth by the Circuit Court. *See* 608 F.2d at 697-98. The case remains before the District Court on remand. In *Baker* v. *City of Detroit*, 483 F. Supp. 930 (E.D. Mich. 1979), *aff'd sub nom. Bratton* v. *City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *cert. pending*, No. 83-551, the Court upheld the legality of that part of the City's affirmative action program imposing a 50/50 black-white ratio for promotions to the rank of lieutenant.[2] The plaintiffs in *Baker* have filed a petition for a writ of certiorari, which is pending.

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[2] A related case, *N.A.A.C.P., Detroit Branch* v. *Detroit Police Officers' Ass'n*, 525 F. Supp. 1215 (E.D. Mich. 1981), involves a challenge to seniority based layoffs. The City and the union representing police officers are being sued for the failure to agree on feasible alternatives to the collectively bargained reverse seniority sequence layoffs. That failure threatens to undermine the remedial effects of the City's affirmative action program. The District Court granted in part and denied in part cross motions for summary judgment and the case awaits further development of the factual record.

(Continued on following page)

In *Van Aken* v. *Young*, 541 F. Supp. 448 (E.D. Mich. 1982), *appeal pending*, No. 82-1570 (6th Cir.), the Court upheld an affirmative action plan under which qualified blacks were hired as firefighters over whites with higher examination scores.

We believe that Detroit's experience with remedying the effects of longstanding racial discrimination in its police and fire departments by means of affirmative action may provide an important perspective to the issues presented in this case.

SUMMARY OF ARGUMENT

Petitioners' contention that a district court has no authority to require a city to achieve economies in ways that do not undermine gains made pursuant to a remedial decree represents on unduly narrow vision of Title VII's remedial purposes and ignores many facets of the problem caused by longstanding patterns of discrimination and exclusion. One such aspect of the problem is the mistrust and antagonism that have developed in our cities between public safety agencies and minorities as a result of years of exclusion of minorities from employment in such agencies. Reliance on reverse seniority sequence layoffs as the only means

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(*Continued from preceding page*)

The challenged action in *N.A.A.C.P., Detroit Branch* is fundamentally different from the action challenged in *Stotts*. The Memphis Fire Department challenges the power of the District Court to order a remedy for racial discrimination. In *N.A.A.C.P., Detroit Branch*, the plaintiffs challenge the City of Detroit's failure to violate its collective bargaining agreement with the Detroit Police Officers' Association (DPOA) in order to insure that layoffs would not disproportionately affect black officers. The plaintiffs in *N.A.A.C.P., Detroit Branch*, allege that the City's attempt to negotiate an affirmative action layoff plan with the DPOA was not sufficient. Despite the strong opposition of the DPOA, the plaintiffs in *N.A.A.C.P., Detroit Branch*, maintain that the City was under a duty to unilaterally violate the collective bargaining agreement.

of addressing Memphis' fiscal crisis would have served to resegregate its fire department and thereby exacerbate existing racial tensions. While it is important for all public service agencies to be able to maintain the remedial gains achieved by affirmative action programs when they become threatened by fiscal troubles, several types of agencies have a particularly critical need. Police departments, fire departments, schools and correctional institutions have extremely important operational needs because of greater public safety concerns or their close relationships with the public. The experience of the City of Detroit is particularly instructive in this regard.

ARGUMENT

I.

CONGRESS INTENDED TITLE VII REMEDIES TO ADDRESS ADVERSE PUBLIC SERVICE CONSEQUENCES OF PRIOR DISCRIMINATION

In 1972, Congress amended Title VII to extend its coverage to state and local governments. An overriding concern was the need to develop effective programs to remedy the history of exclusion of minorities from employment in public service jobs in many communities. There is no doubt that Congress intended Title VII to provide compensation for the employees and applicants for employment who were the direct victims of these discriminatory practices. However, Congress' concern went beyond the need to "make whole" these direct victims. Congress recognized that the public is the ultimate victim of such discriminatory practices and that undoing the harm to the public interest is another goal of Title VII. For example, the 1972 Report to the Senate Committee on Labor and Public Welfare stated:

> The failure of State and local governmental agencies to accord equal employment opportunities is particularly distressing in light of the importance that these agencies play in the daily lives of the average citizen. From local law enforcement to social services, each citizen is in constant contact with many local agencies . . . . Discrimination by government therefore serves a doubly destructive purpose. The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in the particular community, but also creates mistrust, alienation and all too often hostility towards the entire process of government.

S. Rep. 92-415, 92nd Cong., 1st Sess. 10 (1971).

Congress was particularly concerned with protecting the operational ability of public safety agencies to provide effective protection of the public:

> The problem of employment discrimination is particularly acute and has the most deleterious effect in those government activities which are most visible to the minority communities (notably education, law enforcement, and the administration of justice) with the result that the credibility of the government's claim to represent all the people is negated.

H. R. Rep. No. 92-238, 92nd Cong., 1st Sess. 17 (1971).

Senator Harrison Williams, Chairman of the Labor and Public Welfare Committee and sponsor of the bill in the Senate, emphasized the Congressional concern for the ability of units of State and local government to carry out their assigned responsibilities. He stated that the Committee

had acted out of a belief that their work was "essential to the viability of State and local governmental units." 118 Cong. Rec 789-811 (1972). In large part, the Committee's concern with employment discrimination was based upon the unfavorable impact which it had on "the ability of . . . governmental units to deal equitably in their contacts with those groups against whom they discriminate in employment." *Id.* As Senator Williams succinctly phrased the matter, "if they are to carry out their jobs with any success whatever, public confidence in their impartiality is vital." *Id.*

This explicit Congressional concern for protecting the ability of local governmental agencies to carry out their essential functions requires a construction of Title VII that permits use of racial criteria, when needed, to assist in the provision of public services. To this end, it supports not only the implementation of affirmative action programs, but the decision to maintain the gains achieved under such programs in subsequent years of fiscal troubles.

The precedents interpreting Title VII are consistent with this Congressional desire to remedy the adverse public service consequences of prior discrimination. The Court has repeatedly concluded that "make whole" relief is only "*one* of the central purposes of Title VII." *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (emphasis added). Other critical goals of Title VII are "to eliminate, so far as possible, the last vestiges of an unfortunate and ignominous page in this country's history," *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975) (quoting *United States* v. *N. L. Indus. Inc.*, 479 F.2d 354, 379 (8th Cir. 1973)), to "eliminate the discriminatory effects of the past as well as bar like discriminaion in the future," *id.* (quoting *Louisiana* v. *United States*, 380

U.S. 145, 154 (1965)), and to " 'open employment opportunities for Negros in occupations which have been traditionally closed to them.' " *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 203 (1979) (quoting 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey)).

Adverse public safety consequences are a vestige of past discrimination that must be addressed in Title VII remedies involving local governments. The experience of the City of Detroit and other communities demonstrates the strong link between prior discrimination and the current public safety crisis.

II.

THE DISCRETION EXERCISED BY THE DISTRICT COURT IN THIS CASE SERVED CRITICALLY IMPORTANT PUBLIC SAFETY CONSIDERATIONS

A ruling that Title VII prevents the District Court from requiring that fiscal cutback programs preserve the gains achieved pursuant to remedial decrees would severely undermine the effectiveness of public services agencies. Such a ruling would be particularly destructive to law enforcement and other public safety agencies. The Brief filed by the City of Detroit as *Amicus Curiae* last Spring in *Boston Firefighters Union, Local 718* v. *Boston Chapter, N.A.A.C.P.*, 103 S.Ct. 2076 (1983) (*remanded for consideraton of mootness*), sets forth in detail the devastating effects of the exclusion of minorities from the police departments of Detroit and other cities. For the convenience of the Court, the following includes a summary of the more detailed discussion included in our *Boston Firefighters* brief.

A. The Experience Of The City Of Detroit

Detroit has suffered severe law enforcement problems as the result of racially-based police-community tensions. These tensions and their devastating impact on the safety of Detroit's citizens have been traced directly to the years of neglect in the recruitment, hiring and advancement of black police officers. *See Baker* v. *City of Detroit*, 483 F. Supp. 930, 996-97 (E.D. Mich. 1979), *aff'd sub nom. Bratton* v. *City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *cert. pending*, No. 83-551. Major riots in 1943 and 1967, as well as several other civil disturbances which occurred both before and after 1967, are examples of the breakdown of police community relations.

Prior to 1974, six to eight Detroit police officers were killed in the line of duty each year. Moreover, the prevading belief throughout Detroit's black community was that the police had no interest in investigating black-on-black crime. This resulted in a loss of essential citizen cooperation in the efforts of the police department to fight crime. At the same time Detroit police officers were afraid to enter the black communities. Discriminatory police practices were common, and instances of violent conduct by police officers were widespread. The situation was described by the District Court in *Baker*:

> [T]he Police Department was regarded as an "occupation army" in the black community and was treated as such. . . . Officers were afraid to venture into the [black] community for fear of being harassed or worse.
>
> . . . The primary cause was discriminatory practices. Racial criteria entered into the everyday judgments of police officers regarding who they

stopped, searched or detained and how they did it. Racial slurs were common. Police brutality against black citizens was less common but still severe.

* * *

Witness after witness at trial testified that discriminatory police practices were common. . . . Chief Hart testified that "[i]t's a matter of public record that members of the black community have been beaten up by police unjustifiably and without cause; it's a matter of record."

* * *

The Department paid a heavy price for its discriminatory practices. The defendants have accurately characterized what resulted as a "cycle of violence" as the Department and the black community warred on each other.

* * *

The black community's response to Department practices was deep hatred and alienation. Not only did the community hate the police, it had no confidence in the police's interest in investigation or solving black on black crime. This lack of confidence was justifiable. The result was that the police got no cooperation from the black community in solving crime.

This is significant because citizen cooperation is essential to solve crime. Lack of support in the black community was devastating to the Department's efforts to police the City. This was the view of Police Chief Hart, and former Chiefs

> Tannian and Murphy. So substantial was the community's alienation that at times there was active interference with officers performing their duty. . . . The police themselves — and ultimately the citizens of Detroit — were the real victims of discriminatory practices.

483 F. Supp at 996-97.

Only after many painful experiences was the City of Detroit willing to acknowledge and respond to the destructive consequences of its extreme underutilization of black police officers. The 1967 riots jolted the City into realizing the necessity that something be done to correct these imbalances. *See id.* at 946. Between 1967 and 1973, *amicus* made some efforts to recruit, hire and promote blacks, but these efforts were not successful. *Id.* at 947-52.

Finally, in 1974, the City adopted a voluntary affirmative action plan of hiring and promotion. *Id.* at 963-64. As a result of these efforts, the ability of *amicus* to deliver effective police service has dramatically improved. Evidence of the effectiveness of Detroit's affirmative action measures includes improvements in police community relations, lower crime rates, and a reduction in the number of police officers killed in the line of duty. In *Baker*, the district court detailed the resulting improvements, and concluded:

> There is clear evidence in the record that before 1974 there existed enormous tension between the Department and the black community. There is clear evidence in the record that after the institution of the affirmative action program, police-community relations improved substantially, crime went down, complaints

> against the Department went down, and no police officers were killed in the line of duty. High ranking police officials attributed this change to the affirmative action program and its general aim of having the Department — at all levels — reflect the City's population.

Id. at 1000.

In the experience of *amicus*, the ability to make race-conscious employment decisions has been the critical ingredient in efforts to restore community trust in Detroit's law enforcement agencies and to facilitate Detroit's ability to protect the lives and property of its people. Particularly in this type of situation, where a city must implement and maintain an affirmative action plan in order to assure public safety, operational needs necessitate that a district court have the power to preserve affirmative action gains in subsequent fiscal years. In upholding Detroit's affirmative action plan for promotions to the rank of lieutenant, the district court in *Baker* determined that:

> the operational needs argument makes a great deal of sense. More black officers in the Department did not necessarily mean that prejudicial attitudes would go away, but it did mean that prejudicial practices would be reduced. . . . Increasing the number of black officers broke the occupational solidarity which made discriminatory practices easy.
>
> Correspondingly, increased numbers of black officers provided reassurance to the black community that the City was serious about eliminating discrimination. The presence of black officers was instrumental in breaking the cycle of

> alienation and violence. The presence of black officers was a critical factor in changing the black community's perception of the police and winning their cooperation in fighting crime.

Id. at 998. And finally, the court concluded that:

> upon careful review of the testimony, . . . no reasonable person could fail to conclude that given the history of antagonism between the Department and the black community, the affirmative action plan was a necessary response to what had been an ongoing city crisis.

Id. at 1000.

Detroit's experience also demonstrates the need for remedial measures to redress the underrepresentation of minorites in municipal fire departments. "For more than a century, the City of Detroit's Fire Department was, for all practical purposes, the private preserve of white males. No black ever served in the Department until 1938, and until the 1970's black representation was minimal." *Van Aken* v. *Young*, 541 F. Supp. 448, 450 (E.D. Mich., 1982), *appeal pending*, No. 82-1570 (6th Cir.). In 1977, the City implemented an affirmative action program that substantially increased the number of blacks in the Fire Department. The affirmative action program has resulted in a greater degree of cooperation by minority citizens in arson investigations and greater receptivity to fire prevention information. Benefits have been derived in the area of crowd control, fire prevention, arson investigation and a lower incidence of false alarms.

The District Court in *Van Aken* concluded that "increased racial balance in the Fire Department resulted in an enhanced ability to prevent and fight fires." 541 F.

Supp. at 460. This conclusion was based on evidence that the Fire Department had received more public support and cooperation which resulted from respect and confidence in the Department. The district court was "persuaded that many of the [public support and cooperation] factors [demonstrated in police cases] also impact upon the unique role played by fire-fighters in our society, and the evidence in this case supports such a conclusion" *Id.*

B. The Experience Of Other Communities

In many other cities, overwhelming evidence of similar experiences demonstrates that the crisis experienced by Detroit is only one example of the nationwide problem. Recently in *Detroit Police Officers' Ass'n* v. *Young*, 608 F.2d 671, 695 (1979), *cert. denied*, 452 U.S. 938 (1981), the Sixth Circuit collected and summarized the many studies that make the importance of having racially representative police forces in our cities judicially noticeable. The operational need to have a minority presence in public safety agencies that is representative of the minority population of the community served:

> is based on law enforcement experience and a number of studies conducted at the highest levels. *E.g.*, National Advisory Commission on Criminal Justice Standards and Goals, *Police* (1973); National Commission on the Causes and Prevention of Violence, Final Report: *To Establish Justice, To Insure Domestic Tranquility* (1969); Report of the National Advisory Commission on Civil Disorders (1968); President's Commission on Law Enforcement and Adminstration of Justice, *Task Force Report: The Police* (1967). As these reports emphasize, the relationship

between government and citizens is seldom more visible, personal and important than in police-citizen contact. See *To Establish Justice, supra* at 145; *Report on Civil Disorders, supra*, at 300 (New York Times edition)

It is critical to effective law enforcement that police receive public cooperation and support. *Report on Civil Disorders, supra* at 301; *Task Force Report: The Police, supra* at 144-45, 167; *Police, supra* at 330.

These national commissions recommended the recruitment of additional numbers of minority police officers as a means of improving community support and law enforcement effectiveness. In fact, the benefits of Negro officers were recognized as early as 1931 by the "Wickersham Commission." *Report on the Causes of Crime* 242, National Commission on Law Observance and Enforcement (Vol. I, 1931).

In 1967, a presidential commission stated . . . :

> In order to gain the general confidence and acceptance of a community, personnel within a police department should be representative of the community as a whole.

Task Force Report: The Police, supra at 167.

608 F.2 at 695.

The Court of Appeals in *Young* also found that the operational needs of a police department can justify an affirmative action program:

> The argument that police need more minority officers is not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police. In short, the focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions. It is therefore apparent that the district court misconstrued this justification for affirmative action, and that the justification offered by defendants is a substantial one.

Id. at 696.[3]

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[3] Other courts of appeals have agreed with the Sixth Circuit concerning the operational need for a racially representative police force. *See Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher*, 679 F.2d 965, 977-78 (1st Cir. 1982), *remanded for consideration of mootness sub nom. Boston Firefighters Union, Local 718* v. *Boston Chapter, N.A.A.C.P.*, 103 S.Ct. 2076 (1983); *Talbert* v. *City of Richmond*, 648 F.2d 925, 931 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); *Bridgeport Guardians, Inc.* v. *Members of the Bridgeport Civil Service Comm'n*, 482 F.2d 1333, 1341 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975).

Studies completed since the *Young* decision also have found a strong link between discriminatory employment practices and police-community hostility. In a report published in October 1981, the United States Commission on Civil Rights found:

> Serious underutilization of minorities and women in local law enforcement agencies continues to hamper the ability of police departments to function effectively in and earn the respect of predominantly minority neighborhoods, thereby increasing the probability of tension and violence.

U.S. Commission on Civil Rights, *Who is Guarding the Guardians: A Report on Police Practices* 5 (1981). Following an investigation into the May 1980 racial disturbance in Miami, Florida the U.S. Civil Rights Commission observed:

> In Dade County, an essentially white system administers justice to a defendant and victim population that is largely black. The lack of minorities throughout the criminal justice system maintains the perception of a dual system of justice.

U.S. Commission on Civil Rights, *Confronting Racial Isolation in Miami* 290 (1982).

CONCLUSION

We have focused primarily upon the operational needs of public safety agencies because that is the public service in which Detroit has experienced the greatest problems because of exclusion and underutilization of minorities and has achieved the most striking success as the result of affirmative action. Acceptance of the broad arguments advanced by petitioners would have far-reaching effects beyond the facts of the Memphis Fire Department situation. Such a ruling would destroy the ability of financially-strapped cities to find alternatives to destructive layoffs in all public services, including law enforcement. Such a result would threaten the ability of cities to maintain effective public services. At minimum, where public safety is at risk, alternatives must be available and encouraged. The decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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Case Nos. 82-206 and 82-229

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

FIREFIGHTERS LOCAL UNION No. 1784
AND MEMPHIS FIRE DEPARTMENT,
Petitioners,

vs.

CARL W. STOTTS, ET AL.,
Respondents.

AMICUS BRIEF OF DETROIT POLICE OFFICERS ASSOCIATION FILED IN SUPPORT OF PETITIONER FIREFIGHTERS LOCAL UNION 1784, et al.

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1. STATEMENT OF INTEREST

The Detroit Police Officers Association is the recognized bargaining agent for approximately 2,500 police officers of the City of Detroit, Michigan. The DPOA files this Amicus Brief to state its position on legal and constitutional issues of growing significance. DPOA contends that both Title VII and the Constitution prohibit layoff procedures, whether or not by order of a Federal Court, which circumvent lawfully adopted state seniority systems and target individual employees for termination based upon race, rather than seniority.

This Court must now resolve these issues in the context of the City of Memphis' Fire Department. The problems of reductions in force, particularly in safety services, have become

increasingly prevalant throughout the United States, particularly in those regions of the northeast, midwest and south hardest hit by unemployment, thinning populations, and a resulting drop in state and local revenues. These factors, along with reduced federal assistance to cities, have forced dozens of municipal governments to cut back public services in order to live within their means. Those service cuts often mean reductions in force, particularly in the personnel-intense area of safety services.

The decision of the Supreme Court in this case may determine the fate of bona fide seniority systems for public employees throughout this nation. DPOA believes that the concept of seniority was protected by the Congress in the enactment of Title VII, and that any court order requiring an employee to forfeit vested rights gained under a bona fide seniority system because of his race violates the Fourteenth Amendment of the United States Constitution.

The particular distinction between the facts of these cases and other cases allowing "race conscious" remedies is that the "victims" of the remedy are readily identifiable individuals who, along with their families, will be subject to the economic burdens and social stigma of layoffs only because of their race.

In times of high unemployment, the burden of a layoff from a highly skilled and specialized job, such as firefighter or police officer, is particularly accute. It is a burden that is borne by the laid-off public servant as well as his family. But when that burden is imposed not because of the employee's relative qualifications or seniority, but simply because of his race, the stigma becomes unreasonably burdensome and clearly violates constitutional standards set forth by Justice Powell in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978) and a majority of this Court in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980).

A remedy which sets aside a lawfully adopted state seniority system, or a *bona fide* seniority system adopted through

collective bargaining, simply to achieve (or preserve) racial balance also exceeds the scope of a federal court's authority under Title VII of the 1964 Civil Rights Act.

The District Court's modification of the Memphis consent decree to permit race-conscious remedies, as affirmed by the Sixth Circuit violated the Fourteenth Amendment rights of effected white employees, and exceeded the Court's authority under Title VII.

II. SUMMARY OF ARGUMENT

1. THE CONSTITUTION PROHIBITS THE JUDICIAL IMPOSITION OF RACIAL LAYOFF QUOTAS IN PLACE OF A BONA FIDE PUBLIC EMPLOYEE SENIORITY SYSTEM.

In his opinion in *Bakke*, Justice Powell articulated a standard of strict judicial scrutiny for "race conscious" remedies that prefer one race over another, based upon the equal protection clause of the Fourteenth Amendment. That standard of strict scrutiny was adopted by a majority of the Court in *Fullilove*.

The Fourteenth Amendment prohibits a judicial remedy requiring racial balance in public employee layoffs in place of a "last hired, first fired" seniority layoff system implemented under State law or adopted through collective bargaining. Such a remedy may not survive strict judicial scrutiny where the identifiable and innocent "majority" employees are the subjects of a racial classification which causes them to lose their jobs. The abstract goal of preserving a racial balance is not a satisfactorily compelling government interest to justify such a racial classification under the Fourteenth Amendment.

2. TITLE VII DOES NOT SUPPORT A JUDICIAL REMEDY THAT UNNECESSARILY TRAMMELS THE INTERESTS OF INNOCENT EMPLOYEES BECAUSE OF THEIR RACE.

Congress specifically exempted *bona fide* seniority systems from challenge when it adopted Title VII. 42 U.S.C. § 2000e-2(h). Congress's intent in adopting Title VII was to provide equal *opportunity*, not to require racial balance. 42 U.S.C. § 2000e-2(j).

A judicial remedy adopted under Title VII which causes innocent employees to lose seniority rights, and their jobs, because of their race, in order to achieve or preserve a racial balance, exceeds the remedial powers allowed by Congress for the enforcement of Title VII.

III. ARGUMENT

1. THE CONSTITUTION PROHIBITS THE JUDICIAL IMPOSITION OF RACIAL LAYOFF QUOTAS IN PLACE OF A BONA FIDE PUBLIC EMPLOYEE SENIORITY SYSTEM.

The scope of a judicial remedy is limited by both the violation shown by the Plaintiffs, *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977), as well as the constitutional limits upon governmental power applicable to all branches of government.

As a matter of law, this Court may not find that the types of "last hired, first fired" seniority systems used throughout this nation by state or local government, either under state law or through collective bargaining agreements, is a tool of racial discrimination subject to judicial relief.

In these cases the remedy allowed is particularly inappropriate since (1) the white employees laid off out of seniority order, because of their race, were not shown to be participants

in any scheme of racial discrimination, but are simply innocent victims of racial preference; and (2) the minority employees given preference from layoffs, despite lower seniority rights, have not been shown to be "victims" of past and specific acts of discrimination. In fact, the Consent Decree which the district court retroactively modified fails even to confess past discrimination in either hiring or promotion. In these cases, the District Court improperly acted to preserve a racial balance rather than to remedy specific acts of discrimination.

A. The Constitutional Standards for Race Conscious Remedies Have Been Set By Bakke and Fullilove.

Constitutional analysis used by a majority of this Court in a series of cases would suggest that the Fifth and Fourteenth Amendments do not allow the forfeiture of bona fide seniority rights simply to preserve a racial balance.

In *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), this Court set aside a racial preference program for admissions to a state medical school. The key to the Court's decision appeared to be the ability of Bakke to show that the burden of the racial preference fell upon identifiable "majority" applicants, who were denied admission only because of their race.

As with the remedy approved by the Court of Appeals in this case, the racial preference adopted by the University of California was not designed to provide a remedy to specific and proven victims of past discrimination, but rather was intended to encourage racial balance in order to satisfy more general social goals. Justice Powell, in his lead opinion, found that Title VI of the 1964 Civil Rights Act "must be held to prescribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." 438 at 287. He then examined the historical development of Fourteenth Amendment's applicability to claims of racial or ethnic discrimination:

> "As the nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination. See *Strauder* v. *West Virginia*, 100 U.S. 303, 308 (1880) (Celtic Irishman) (dictum); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886) (Chinese); *Truax* v. *Raich*, 239 U.S. 33, 41 (1915) (Austrian resident aliens); *Korematsu*, *supra*, (Japanese); *Hernandes* v. *Texas*, 347 U.S. 475 (1954) (Mexican-Americans). The guarantees of equal protection, said the court in *Yick Wo*, are 'universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. 118 U.S. at 369."
>
> 438 U.S. at 292-93

In analyzing and rejecting the notion that racial classification, if "benign", may be made on behalf of a traditional racial minority, Justice Powell noted that:

> "The concepts of 'majority' and 'minority' necessarily reflect temporary arrangements and political judgments. As observed above, the white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. . . . There is no principled basis for deciding which group would merit 'heightened judicial solicitude' and which would not."
>
> 438 U.S. at 295-296.

Of partciular significance to the claims of Petitioners in this case was Justice Powell's focus upon the improper burden that "benign" racial classifications may have upon individual and innocent victims of such classifications:

> "[T]here is a measure of inequity in forcing innocent persons in Respondent's position to bear the burdens of redressing grievances not of their making."
>
> 438 at 298.

In the case of laid off but more senior "majority" public employees, the burden is clear and swift – the loss not only of seniority or educational opportunities but of a *job*.

In rejecting the specific racial quota adopted in *Bakke*, Justice Powell distinguished a series of cases which have allowed courts to formulate "race conscious" remedies for proven constitutional violations. In those cases the following elements were shown:

> (1) In school desegregation cases, such remedies were allowed because "[e]ach involved remedies for clearly determined constitutional violations. E.g., *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971)."; and
>
> (2) "[T]he scope of the remedies was not permitted to exceed the extent of the violations. E.g., *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977)."; and
>
> (3) In certain employment discrimination cases, race-conscious remedies were allowed, such as the award of retroactive seniority only to "*the victims of discrimination* – not just by society at large, but by the respondent in that case."; and
>
> (4) Only where such an award was necessary " 'to make [the victims] whole for injuries suffered on account of unlawful employment discrimination.' " citing *Franks* v. *Bowman Transportation Company*, 424 U.S. 747 (1976).
>
> 438 U.S. at 301-02.

In concluding that the *Bakke* quota violated the Fourteenth Amendment, Justice Powell applied strict judicial scrutiny to an inherently suspect racial classification stating that:

> "Prefering members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."
>
> 438 U.S. at 307.

In the context of the "strict scrutiny" of an inherently suspect racial classification, the classification may be supported only by a "compelling" government interest. As stated in *In re Griffiths*, 413 U.S. 717, 721-722 (1973), the suspect classification may be justified only when a government agency

> "show[s] that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment of its purpose or the safeguarding of its interest."

Justice Powell in *Bakke* noted that the Court had allowed racial classifications "at the expense of other innocent individuals" only upon "judicial, legislative, or administrative findings of constitutional or statutory violations." 538 U.S. at 307. Then the racial classification is allowable as a remedy because "the legal rights of the victims must be vindicated". 438 U.S. at 307. Even under those circumstances, "the remedial action usually remains subject to continuing oversight to *assure that it will work the least harm possible to other innocent persons competing for the benefit.*" 438 at 307. (Emphasis added.)

These constitutional limits upon race conscious remedies appear to have been adopted by a majority of this Court. In *Bakke*, the Chief Justice, along with Justices Stevens, Stewart, and Rehnquist, concluded that the University's Special Admissions Program violated Title VI of the Civil Rights Act of 1964 because of its racial exclusion of *Bakke*. Their opinion, written by Justice Stevens, specifically avoided reaching the constitutional issues.

In *Fullilove* v. *Krutznick*, 448 U.S. 448 (1980), the full court for the first time examined the *constitutionality* of a racial preference program (the minority set aside program adopted under the Public Works Employment Act of 1977, which required that 10% of that program's funds be expended through minority business enterprises). While the court held that the Act did not violate the Equal Protection concepts inherent in the Fifth Amendment, a majority of the court ap-

pears to adopt the "strict scrutiny" standard of Justice Powell in *Bakke* for the review of programs involving racial preference.

Chief Justice Berger, in an opinion joined by Justices White and Powell, noted that a program that employs racial or ethnic criteria, even in a remedial context, calls for a "most searching examination to make sure that it does not conflict with constitutional guarantees". 448 at 491. In his separate opinion Justice Powell repeated the view he expressed in *Bakke* that strict scrutiny should be applied. Justice Powell perceived the Chief Justice's opinion as "substantially in accord" with his own views. 448 U.S. at 496.

The opinion of the Chief Justice, joined in by Justices White and Powell, as well as the separate opinion of Justice Powell suggest that the minority set aside program was permissible only because of its limited impact upon "non-minority" contractors. The Chief Justice held that the act was neither under-inclusive or over-inclusive, 448 U.S. at 485-90, and satisfied the standard of a narrowly tailored remedy designed to correct specific past discrimination identified by Congress. The Chief Justice specifically noted that the program was not constitutionally defective since the actual burden shouldered by the non-minority firms was relatively light, amounting to less than 2.5% of annual construction spending. 448 U.S. at 484.

Three other Justices dissented, applying an even stricter constitutional review. Justice Stewart, joined by Justice Rehnquist argued that *all* racial classifications are suspect in that the Equal Protection Laws prohibit *any* statutory classification based on race. 448 U.S. at 523-27. Justice Stevens found that the statute was unconstitutional because it could not be fairly characterized as a "narrowly tailored" racial classification designed to remedy a specifically demonstrated violation. 448 U.S. at 553. He argued that racial classifications are "simply too pernicious to permit any but the exact connec-

tion between justification and classification." 448 U.S. at 537.

An examination of *Bakke* and *Fullilove* would indicate that a majority of the Court has endorsed strict judicial scrutiny of racial preference remedies. *Fullilover* represents statements by at least six Justices rejecting race conscious "remedies" which cannot survive genuine strict judicial scrutiny.

B. The District Court's Modification of the Consent Decree Fails the Test of Strict Scrutiny.

The analysis adopted by the Sixth Circuit in this case simply fails to relate the extreme remedy of emasculating a bona fide seniority system to any compelling government interest of remedying proven constitutional violations.

First, there has never been a judicial determination, or an admission of intentional discrimination by the City of Memphis and its Fire Department. The two consent decrees of 1974 and 1980 contain no admissions by the City of unlawful discrimination. To the contrary, in the 1974 consent decree, the City of Memphis denied "it has heretofore engaged in any pattern or practice of discrimination in hiring or promotion on the basis of race or sex . . ." In the 1980 decree the City noted that by entering into the consent decree, it did "not thereby admit any violations of law, rule, or regulation with respect to the allegations made by plaintiffs in their complaint." Nonetheless, the Sixth Circuit apparently construed the consent decrees as admissions of liability. *Stotts* v. *Memphis Fire Department*, 679 F.2d 541 (6th Cir. 1982), without support either in the actual consent decrees or in the law.

Second, there has been no showing that the minority employees of the city protected by the modified consent decree were the victims of past discrimination.

Instead of applying strict scrutiny, as articulated in *Bakke* and *Fullilove*, the Sixth Circuit relied upon the more general

policy favoring settlement of Title VII cases, suggesting that such policy would be undermined if courts investigated the "facts underlying each party's positions." However, such an ambiguous and unwritten legislative policy, cannot be permitted to infringe upon the constitutional rights of the innocent victims of such a policy.

The Sixth Circuit also justified its refusal to engage in strict scrutiny by noting that "a consent decree, the preferred means of resolving an employment discrimination suit, does not decrease the power of a court to order relief which implicates the policies of Title VII and 42 U.S.C. Sections 1981 and 1983." 679 F.2d at 544. According to the Sixth Circuit, if a violation of 42 U.S.C. Section 1983 *had* been established, the court would have had the authority to invoke the supremacy clause to override the union's seniority provisions and state law. The Court therefore held that use of "the preferred means of resolving an employment discrimination act" did not decrease "the power of a court to order relief which vindicates the policies embodied within Title VII and 42 U.S.C. Sections 1981 and 1983." 679 F.2d at 544. Yet the District Court could not order such relief without evidence satisfying the test of strict judicial scrutiny. In this case, no such evidence was provided. The hypothetical power of the district court *if* such evidence was presented, does not support a race conscious layoff remedy ordered in this case *without* such evidence.

The Equal Protection Clause commands the *elimination* of racial barriers, not the creation of barriers to satisfy someone's theory as to how society ought to be organized. *DeFunis* v. *Odegarrd*, 416 U.S. 312 (1974) (Douglas dissenting). The District Court's use of racial preference to set aside a lawfully adopted and racially neutral seniority system established through collective bargaining violates "the Equal Protection component of the Due Process Clause of the Fifth Amendment". *Fullilove* v. *Klutznick*, 448 U.C. at 473. To the extent that the layoffs were implemented by local

government authorities, whether or not under order of the District Court, the use of the racial preference violated the Equal Protection Clause of the Fourteenth Amendment.

2. TITLE VII DOES NOT SUPPORT A REMEDY WHICH UNNECESSARILY DAMAGES INNOCENT EMPLOYEES BECAUSE OF THEIR RACE.

Both Congress and this Court have clearly restricted the ability of the courts or employers to set aside *bona fide* seniority systems for the sake of preserving racial balance. Both the Congress and this Court have been guided by principles of fairness which must protect innocent employees from job loss on account of their race.

The District Court and the Sixth Circuit has allowed the modification of the Memphis consent decree, at least in part, based upon its power to remedy employment discrimination under Title VII. Yet Congress has placed limits on Title VII which prohibit the unnecessary denial of bona fide seniority rights to innocent employees because of their race.

Section 703(j) of Title VII provides that Title VII does not require an employer "to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of an imbalance which may exist with respect to the total number of percentage of persons of any race . . . in comparison with the total number or percentage of persons of such race . . . in the available work force in any community, state, section, or other country." 42 U.S.C. § 2000e-2(i).

In this case, the Sixth Circuit dwelt not upon the specific need to remedy individual victims of past employment discrimination, but rather upon the apparent desire of the Court that the Memphis department reflect the racial composition of the community. The concern of the Sixth Circuit apparently was to seek "racial diversity in the supervisory ranks

of municipal government serving a multi-racial city, 679 F.2d at 560, rather than that specific victims of past discrimination be made whole.

Section 703(a) of the Act (42 U.S. § 2000e-2(h)) also indicates congressional intent to protect the function of bona fide seniority systems:

> "(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment, pursuant to bona fide seniority or merit system. . ."

The Court of Appeals did not find that Memphis' "last hired, first fired" layoff system was anything less than bona fide.

In *Teamsters* v. *United States*, 431 U.S. 324 (1977), this Court found that Section 703(h) protects bona fide seniority systems, even if they unintentionally perpetuate pre-Act discrimination.[1] In *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976), the Court allowed a remedy which awarded certain retroactive seniority rights to *identified victims* of past discrimination. Yet even in that case Justice Powell recognized the danger of tampering with a bona fide seniority system when the rights of innocent parties are placed in jeopardy:

> "[C]ompetitive seniority benefits, as the term implies, directly implicate the rights and expectations of perfectly innocent employees. The economic benefits awarded discrimination victims would be derived not at the expense of the employer but at the expense of other workers. Putting it differently, those disadvantaged – sometimes to the extent of losing their jobs entirely – are not the

[1] Title VII was applied to public employers in 1972. 42 U.S.C. § 2000e(a)(f).

> wrongdoers who have no claim to the chancellor's conscience, but rather are innocent third parties."
>
> 424 U.S. at 788-89 (Opinion by Powell, J., concurring in part and dissenting in part).

The Sixth Circuit attempted to discount the rights and expectancies of white employees who have been innocent themselves of discrimination, but who will bear a burden of lost jobs and lost promotional opportunities under the modified decree. The Sixth Circuit stated that "the expectation of non-minorities is based upon a pre-decree minority promotion ratio which presumptively was based on the City's discriminatory promotional practices." 679 F.2d at 556.

Justice Powell specifically rejected this logic in his opinion in *Franks*:

> "Some commentators have suggested that the expectations of incumbents somehow may be illegitimate because they result in past discrimination against others. Such reasoning is badly flawed. Absent some showing of collusion, the incumbent employee was not a party to the discrimination by the employer. Acceptance of the job when offered hardly makes one an accessory to a discriminatory failure to hire someone else. Moreover, the incumbent's expectancy does not result from discrimination against others, but is based on his own efforts and satisfactory performance."
>
> 424 U.S. at 788-79, n.7. (Citations omitted).

In *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), the court upheld a racial quota voluntarily negotiated between a *private* employer and a labor union, which set aside certain slots in a job training program for minority employees. In Justice Brennan's opinion for the majority, he noted that a key factor in winning the Court's approval was that "the plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white

workers and their replacement with new black hirees." 443 U.S. at 208.

In this case, the District Court's injunction required the discharge of certain white employees in place of less senior minority employees. 679 F.2d at 977, n.14. As such, the District Court's order unnecessarily trammeled the rights of the more senior white employees, resulting in their discharge. Certainly *Weber* does not support plaintiff's claim that Title VII permits this extreme remedy.

This Court has never ruled on the permissibility of racial quotas imposed on or by public employers with regard to promotional or other seniority rights. Yet several circuit courts have restricted such quotas, where not shown as necessary to remedy specific victims of past promotional discrimination. In *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333 (2nd Cir. 1973), *cert. den.*, 421 U.S. 991 (1975), black patrolmen sought to restrain the City's discriminatory employment practices. The district court imposed hiring and promotional quotas. The Second Circuit, in reversing the promotional quota, noted the effect on innocent white employees:

> "[T]he imposition of quotas will obviously discriminate against those Whites who have embarked upon a police career with the expectation of advancement only to be now thwarted because of their color alone. The impact of the quota upon these men would be harsh and can only exacerbate rather than diminish racial attitudes. . . . We see no purpose in curing a past mischief by imposing a new one which is deliberately tainted."
>
> 482 F.2d at 1341. (Citations omitted).

In *Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420 (2d Cir. 1975), *cert. den.*, 429 U.S. 823 (1976), the Second Circuit again refused to affirm a promotional quota which denied promotions to law enforcement officers solely because of their race:

> "A hiring quota deals with the public at large, none of whose members can be identified individually in advance. The quota placed upon a small number of readily identifiable candidates for a promotion is an entirely different matter. Both these men and the court know in advance that regardless of their qualifications and standing in the competitive examination, some of them may be bypassed for advancement solely because they are white." 520 F.2d at 429.

When a racial quota is applied to public employee layoffs, the employees' job, not simply his promotion, is at stake. Certainly the considerations outlined by the Second Circuit in *Brideport Guardians, Inc.* and *Kirkland* are even more significant when seen in the context of layoffs. *See also White* v. *Carolina Paper Board Corporation*, 564 F.2d 1073 (4th Cir. 1977).

The Court's opinion in *Ford Motor Company* v. *EEOC*, 102 S. Ct. 3057 (1982), appears to focus upon the same rights which Petitioners in this case assert: the rights of innocent employees who may be victimized by race conscious remedies. In *Ford* the court rejected a rule adopted by the district court which prohibited the tolling of accrued back pay when an employer charged with violating Title VII unconditionally offered a claimant the job previously denied. The question was whether or not an employer was required to offer the claimant seniority retroactive to the date of the alleged discrimination, despite a previous and unaccepted offer of employment. In her opinion for the Court, Justice O'Connor stated that the rejected rule

> "threatens the interests of other, innocent employees by disrupting the established seniority heirarchy, with the attendant risk than an innocent employee will be unfairly laid off or disadvantaged because a Title VII claimant unfairly has been granted seniority."
>
> 102 S. Ct. at 3070.

Congress did not intend by the adoption of Title VII to disrupt bona fide seniority systems, including layoff procedures implemented in order of seniority. Nor did Congress intend to allow racial preferences in layoffs in order to achieve or preserve a racial balance, particularly where the preferred employees have not been shown to be the victims of specific acts of discrimination. This Court must set aside judicial remedies adopted under Title VII which exceed Congress' clear intent in adopting that statute.

IV. CONCLUSION

Public employee layoffs never seem to occur without difficult public debate, particularly when police and fire personnel and the services they provide are cut. Our cities need not be burdened by a second and rankerous level of public debate on the issue of racial preference and quotas.

The "last hired, first fired" concept is based upon long experience and tradition, and has been implemented through racially neutral collective bargaining agreements and laws adopted by the states and local governments. It provides an orderly and sensible method of dealing with difficult community and political problems.

Judicial tampering with seniority order layoffs in the name of racial balance creates division and disorder. It separates public employees by race. It can destroy the morale of public employees and the confidence of the public. More significantly – race discrimination in the context of layoffs victimizes and stigmatizes innocent and dedicated public employees solely because of their race. This burden placed on the victims of racial balance is wholly contrary to the traditions of equal treatment and opportunity embodied in our Constitution and expressed by Congress in Title VII.

This Court must announce a firm standard which is consistent with the plain language of the Fourteenth Amendment

and with Title VII, and which clearly indicates that the goal of racial balance does not justify the type of racial discrimination against innocent and identifiable individuals which is expressly prohibited by our Constitution and Title VII.

Respectfully submitted,

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Nos. 82-206, 82-229

IN THE

Supreme Court of the United States

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FIREFIGHTERS LOCAL UNION NO. 1784,
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v.

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

This brief amicus curiae of the Equal Employment Advisory Council ("EEAC") is submitted with the consent of the parties [1] in support of the petitioners.

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[1] Their consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership consists of a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity (EEO) whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*) as well as other equal employment statutes and regulations. As such, they have a direct interest in the issue presented for the Court's consideration in the instant case—*i.e.*, whether a court has the authority to modify a consent decree, which is silent with regard to layoffs, by overriding a bona fide seniority system which provides for layoffs by seniority, where the modification is opposed by the employer and the union and where there has been no judicial finding of discrimination.

EEAC is particularly concerned about the seniority issues raised herein. Seniority systems are prevalent not only within numerous state public employment schemes, but throughout American industry as well.[2]

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[2] Since passage of the Wagner Act in 1935, seniority provisions, including layoff policies, have been a mandatory subject

EEAC's members, as major employers of the nation's work force, have a substantial interest in helping to reinforce and ensure the validity of these seniority systems. Accordingly, because of its interest in issues involving the interpretation of Section 703(h) of Title VII, which immunizes from Title VII liability neutral, bona fide seniority systems, EEAC has filed briefs as amicus curiae with this Court in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982); *California Brewers Ass'n v. Bryant*, 444 U.S. 598 (1980); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); and *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). In addition, EEAC filed an amicus brief in *Firefighters v. Boston Chapter, NAACP*, 51 U.S.L.W. 4566 (U.S. May 16, 1983), which this Court remanded for consideration of mootness.

STATEMENT OF THE CASE

This case involves a challenge to an order which had the effect of overriding the "last hired, first fired" seniority system of the Memphis Fire Department. The order modified the terms of a consent decree entered in 1980 and ostensibly was designed to prevent the erosion of progress under the 1980 consent decree and an earlier consent decree entered

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of collective bargaining. 29 U.S.C. § 151 (1973), construed in *United States Gypsum Co.*, 94 N.L.R.B. 112, 114 (1951); *Hilton Mobile Homes*, 115 N.L.R.B. 873 (1965). This Court has noted that seniority provisions "are universally included in these contracts." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79 (1977).

in 1974. In order fully to understand the posture of this case, it is necessary to consider the intent and effect of both the 1974 and the 1980 consent decrees, as well as the layoffs that gave rise to the instant case.

The 1974 consent decree arose out of a lawsuit filed by the United States Department of Justice alleging a pattern or practice of discrimination in employment against blacks in the Memphis Fire Department and various other city divisions.[3] The consent decree was approved and entered by the United States District Court for the Western District of Tennessee. The City adopted "as its long term goal in this decree, subject to the availability of qualified applicants, the goal of achieving throughout the work force proportions of black and female employees in each job classification, approximating their respective proportions in the civilian labor force" (J.A. 101). As a means of achieving this long term goal, the consent decree contained an interim goal of increasing the level of black employment in the uniform positions of the Fire Department by five percent (5%) by June 30, 1976 (J.A. 105). Achievement of the goals of the decree expressly were made subject to anticipated budget vacancies. *Id.*, at 105. With regard to the Fire Department, no specific numerical goals were to be established unless the City failed to meet the above goal of increasing black employment by five percent (5%). The decree did not establish specific numerical goals for any rank above firefighter, but acknowledged the need to increase the number of blacks in the supervisory rank. *Id.*, at 107.

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[3] The 1974 consent decree is set forth in the Joint Appendix ("J.A.") at 98-115.

The 1974 consent decree contained no finding of discrimination on the part of the City, and the City expressly denied that it had engaged in any pattern or practice of discrimination (J.A. 99). The decree provided that for purposes of promotion, transfer and assignment, total or City-wide seniority would be considered (J.A. 103). Finally, the 1974 consent decree was silent with regard to layoffs, reductions in rank and recall rights, and "constructive" seniority was not awarded to any alleged victims of the City's practices.

On February 16, 1977, Carl Stotts, a black employee of the Fire Department, filed a class action suit alleging that the Fire Department's hiring and promotion practices violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, and 42 U.S.C. §§ 1981 [4] and 1983 [5] (J.A. at 8). On June 19, 1979, Fred Jones, a black employee

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[4] 42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

[5] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

of the Fire Department, filed an individual action alleging a denial of a promotion because of his race (J.A. 15). The *Stotts* and *Jones* cases were consolidated. On May 6, 1980, a second consent decree was approved and entered by the district court (App. 59-69).[6]

The 1980 consent decree pertained solely to the Fire Department and was "not intended to conflict with any provisions" of the 1974 decree, but rather was intended to "parallel and supplement" the earlier decree (App. 60). The 1980 decree adopted the long term goal of the 1974 decree, and established an interim hiring goal of filling fifty percent (50%) of all vacancies with blacks, and a promotional goal of twenty percent (20%) (App. 64-65). The decree expressly stated that the City did not "admit any violations of law, rule, or regulation with respect to the allegations made by plaintiffs in their complaints." *Id.*, at 60. The decree also provided that:

> Both plaintiffs and the class they represent shall seek no further relief for the acts, practices or omissions alleged in the complaints save to enforce the provisions of this Decree, thereby waiving the right to seek further relief. (App. 61).

Like the 1974 decree, the 1980 decree contained no provision regarding layoffs, reductions in rank or recall rights, and no class member was granted retroactive seniority.

In May 1981, the City announced layoffs in all divisions of the City government, including the Fire Department. The layoffs were necessitated by a deficit in the City's projected operating budget. The lay-

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[6] "App." refers to the Appendix to the petition for a writ of certiorari filed herein by the City.

off policy adopted by the City was based on city-wide seniority and was consistent with the Memorandum of Understanding entered into by the City and Local 1784 of the International Association of Firefighters (hereinafter "the Union" or "Local 1784").[7] Under the layoff policy, employees whose positions were to be eliminated could "bump" employees in lower ranking positions with less seniority. The result of the policy was that employees in the Fire Department with the least seniority would be laid off.

On May 4, 1981, Stotts and Jones obtained a temporary restraining order preventing the layoff or reduction in rank of minority employees of the Fire Department (J.A. 23). On May 5, 1981, with the consent of the parties, the Union was granted intervention (J.A. 24). Following a hearing held on May 8, 1981, the district court orally announced its decision to enter a preliminary injunction (App. 72-76). In so doing, the court found that neither the 1974 nor the 1980 consent decrees contemplated what method would be used for a reduction in rank or layoff (App. 73). In addition, in its oral ruling, the court stated:

> I do find that the adoption of this layoff policy was not adopted with the intent or specific purpose to discriminate against black[s], and I find no reason—well, neither the layoff nor the policy adopted was intended to be discriminatory. However, I find it inescapable that the *effect* is discriminatory (App. 73) (emphasis added).

The court also found that because "the proposed system is in effect discriminatory, I find that such a [system] is not a bona fide seniority system" (App.

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[7] The layoff policy of the City is set forth in J.A. 82-96. The Memorandum of Understanding is set forth in J.A. 116-119.

74). In its preliminary injunction order issued on May 18, 1981, the district court enjoined the City from applying the seniority layoff policy insofar as it would decrease the percentage of blacks in certain specified positions in the Fire Department (App. 77-79).

The Sixth Circuit, in an opinion reported at 679 F.2d 541, affirmed the judgment of the district court. The court of appeals stated that a consent decree may be modified either in accordance with basic contract principles or upon changed circumstances. *Id.*, at 560-61. The court found that by the 1974 and 1980 consent decrees the City had contracted to increase the number of blacks in the Fire Department, and that the district court's order modifying the decree was designed to compel compliance with the terms and goals of the decrees. *Id.*, at 561-62. The Sixth Circuit also found that the consent decree could be modified based on new and unforeseen conditions which threatened to frustrate the purpose of the decree. *Id.*, at 562-63.

Despite the fact that the court of appeals held that "[t]he district court erred in ruling that the seniority system was non-bona fide," *id.*, at 551 n.6 and 565-66, the court determined that the district court correctly modified the consent decree to alter the seniority system over the objections of the City and the union. *Id.*, at 564-67.

SUMMARY OF ARGUMENT

The court of appeals erred in ordering the modification of a consent decree over the objection of the employer and a union in order to override a bona fide seniority system which governed the order of layoffs. Where a court has found discrimination against particular individuals, the remedial purposes of Title

VII may be fully served by awarding retroactive "rightful place" seniority to those individuals and slotting them into the existing seniority system. In the absence of a finding of intentional discrimination in the adoption or maintenance of the system or the agreement of all interested parties, however, the courts are without authority to prohibit the use of "last hired, first fired" seniority systems.

Congress intended that Section 703(h) of Title VII would immunize bona fide seniority systems from challenge under Title VII or other federal laws. The legislative history of Title VII expressly and repeatedly states that Title VII would have no effect on bona fide seniority systems. "If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII . . . even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes" 110 Cong. Rec. 7207 (1964).

The Court has recognized the "overriding importance" of seniority provisions, and that seniority systems are entitled to "special treatment" under Title VII. Seniority systems adopted both before and after Title VII and which operate to perpetuate either pre- or post-Act discrimination are not unlawful unless the system was adopted or maintained with a discriminatory intent or purpose. *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). Since the district court determined that the layoff policy herein was not adopted with the intent to discriminate, the decision of the Sixth

Circuit conflicts with the express Congressional intent underlying the enactment of Section 703(h).

The reasons advanced by the court of appeals in this case do not justify the abrogation of the bona fide seniority system herein. Neither the 1974 nor the 1980 consent decree contained an express or implied obligation on the part of the City to conduct layoffs in a manner inconsistent with the express "last hired, first fired" policy negotiated with the Union. Moreover, the means chosen by the City to meet the "changed circumstances" arising from the necessity of layoffs is permitted *expressly* by Title VII. Neither Sections 1981 or 1983 nor this Court's decision in *United Steelworkers v. Weber*, 443 U.S. 193 (1979) provide any basis for overriding the bona fide seniority system used herein.

By granting to the district court the authority to modify a consent decree over the objections of affected parties so as to override the agreemnt of the City with the Union regarding layoffs, the decision below will discourage the settlement of such employment discrimination cases in the future. Thus, the decision of the Sixth Circuit is inconsistent with the policy under Title VII favoring voluntary compliance as the preferred means of eliminating employment discrimination.

ARGUMENT

I. THE COURT BELOW EXCEEDED ITS AUTHORITY WHEN IT MODIFIED A CONSENT DECREE TO PROHIBIT LAYOFFS BASED ON A BONA FIDE SENIORITY SYSTEM, WHERE THE MODIFICATION WAS OPPOSED BY THE EMPLOYER AND THE UNION AND WHERE THERE HAD BEEN NO FINDING OF DISCRIMINATION

The court of appeals erred in ordering the modification of a consent decree in order to override a bona

fide seniority system which governed the order of layoffs. In the absence of a finding of unlawful discrimination or the consent of all interested parties, the court was without authority to modify the decree to prohibit the operation of the City's "last hired, first fired" seniority policy. The decision of the court of appeals ignores the express language of Section 703(h) of Title VII and the intent of Congress that bona fide seniority systems are to be immunized from attack under Title VII and other federal statutes prohibiting employment discrimination.

A. Section 703(h) And Its Legislative History Expressly Immunize Bona Fide Seniority Systems From Challenge

Section 703(h) of Title VII, 42 U.S.C. § 2000e-2 (h) provides, in pertinent part, as follows:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race.

It is clear from a plain reading of Section 703(h) and its legislative history, as well as from the decisions of this Court, that Section 703(h) was intended to immunize a bona fide seniority system, such as that used in the instant case, from challenge under Title VII or other federal laws.

As this Court has noted, "[t]he example of a 'seniority system' most frequently cited in the congressional debates was one that provided that the 'last hired' employee would be the 'first fired.'" *California Brewers Ass'n v. Bryant*, 444 U.S. 598, 605 n.10

(1980). It is clear that Congress recognized that in many instances the operation of such a bona fide seniority system could have a disparate effect on more recently hired minorities. Despite this recognition, Congress nonetheless determined that the protection of a bona fide seniority system was of overriding importance.

The legislative history of Title VII is unmistakably clear that Congress intended to carve out bona fide seniority systems from the general prohibitions of Title VII. For example, Senators Clark and Case, the "bipartisan captains" responsible for Title VII in the Senate, in response to suggestions that Title VII would destroy existing seniority systems, placed an interpretive memorandum in the Congressional Record which read in part as follows:

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier. 110 Cong. Rec. 7213 (1964).

In addition, Senator Clark also placed in the Congressional Record a statement of the Department of Justice which read:

> First, it has been asserted that title VII would undermine vested rights of seniority. This is not

correct. *Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes.* Title VII is directed at discrimination based on race, color, religion, sex, or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of his race. Of course, if the seniority rule itself is discriminatory, it would be unlawful under title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of the title. I do not know how anyone could quarrel with such a result. But, in the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of title VII. Employers and labor organizations would simply be under a duty not to discriminate against Negroes because of their race. Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title. *Id.*, at 7207 (emphasis added).

Senator Clark also introduced into the Congressional Record answers to a series of questions posed by Senator Dirksen. The following question and answer is directly relevant to the instant case:

> Question. Would the same situation prevail in respect to promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for "last hired, first fired." If the last hired are Negroes, is the employer discriminating if his contract requires they be first fired and the remaining employees are white?
>
> Answer. Seniority rights are in no way affected by the bill. *If under a "last hired, first fired" agreement a Negro happens to be the "last hired," he can still be "first fired" as long as it is done because of his status as "last hired" and not because of his race. Id.*, at 7217 (emphasis added).

As this Court noted in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 352 (1977), these statements are "authoritative indicators" of the purpose of Section 703(h). There are numerous other statements in the legislative history which unequivocally indicate that Congress intended that the routine application of a bona fide seniority system would not be unlawful under Title VII.[8]

B. This Court Consistently Has Rejected Attacks On Bona Fide Seniority Systems

This Court has recognized on a number of occasions the "overriding importance" of seniority provisions, *Humphrey v. Moore*, 375 U.S. 335, 346 (1964); *Ford Motor Co. v. EEOC*, 102 S.Ct. 3057,

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[8] *See, e.g.*, 110 Cong. Rec. 1518 (1964) (remarks of Rep. Celler); *id.*, at 5423 (remarks of Sen. Humphrey); *id.*, at 6564 (remarks of Sen. Kuchel); *id.*, at 6565-66 (memorandum prepared by House Republican sponsors); *id.*, at 9113 (remarks of Sen. Keating); *id.*, at 11848 (remarks of Sen. Humphrey).

3070 (1982); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 76 (1982); *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 766 (1976), and that seniority systems are entitled to "special treatment" under Title VII. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1977). In light of the "increasing importance" of seniority systems to this country's system of employment, *Franks v. Bowman Transp. Co., Inc., supra*, 424 U.S. at 766,[9] this Court in a series of decisions has refused to override the plain meaning of Section 703(h) and the intent of Congress.

In *International Brotherhood of Teamsters v. United States, supra*, 431 U.S. at 352-53, the Court expressly acknowledged that a seniority system may have the effect of perpetuating prior discrimination. Despite this recognition, the Court held that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." *Id.*, at 353-54. In so holding, this Court noted that:

> Although a seniority system inevitably tends to perpetuate the effects of pre-Act discrimination in such cases, the congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water

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[9] *See* S. Slichter, J. Healy, & E. Livernash, The Impact of Collective Bargaining on Management, 104-141 (1960). Seniority-based layoff provisions in both the public and private sector have proliferated because they reward service, loyalty and stability; they make for increased efficiency and safety in times of layoff; and, by securing each worker's place in the hierarchy of the organization, they improve labor relations. Moreover, they benefit all workers equally; as the most senior workers have paid their dues on layoff in years past, the least senior workers will be compensated for their time on layoff with job security in the future.

> down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act. *Id.*, at 352-53.

In *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977), decided the same day as *Teamsters*, this Court held that the operation of a bona fide seniority system is not unlawful under Title VII even though it may perpetuate post-Act discrimination that was not the subject of a timely charge. *See also American Tobacco Co. v. Patterson, supra*, 456 U.S. at 75-76; *Teamsters, supra*, 431 U.S. at 348 n.30. In *American Tobacco Co. v. Patterson, supra*, 456 U.S. at 76, this Court held that Section 703(h) immunizes seniority systems adopted before *and* after the effective date of Title VII.

Thus, where a seniority system does not have its genesis in racial discrimination, and where, as here, "it was negotiated and has been maintained free from any illegal purpose," *Teamsters, supra*, 431 U.S. at 356, the seniority system is not subject to attack simply because of its disparate effect. This Court reaffirmed in *American Tobacco Co. v. Patterson, supra*, 456 U.S. at 69-70, that a seniority system which has a disparate effect is not unlawful under Title VII unless it was adopted or maintained with a *discriminatory intent or purpose. See also Trans World Airlines, Inc. v. Hardison, supra*, 432 U.S. at 82 n.13. In addition, this Court has noted with regard to Section 703(h) that "[d]iscriminatory intent here means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive." *Pullman-Standard v. Swint*, 456 U.S. 273, 289-90 (1982).

The district court in this case determined that the "layoff policy was not adopted with the intent or

specific purpose to discriminate" (App. 73). The district court, nonetheless, concluded that the seniority layoff system was non-bona fide because of its discriminatory effect (App. 74). The court of appeals noted that the district court's finding that the layoff policy was not adopted with a discriminatory purpose was not challenged on appeal, 679 F.2d at 551 n.6, and held that the district court had erred in its conclusion that the system was not bona fide. *Id.*, at 551 n.6 and 565-66. Thus, it is clear that the layoff policy herein was not adopted by the City with a discriminatory intent or purpose and is bona fide within the meaning of Section 703(h).[10]

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[10] The court of appeals herein declined to decide the plaintiff's contention below that *Teamsters* was inapposite because the collective bargaining agreement between the City and the Union was void and unenforceable under Tennessee law. 679 F.2d at 564 n.20. However, that issue is not relevant to the instant inquiry. This Court in *California Brewers Ass'n v. Bryant*, *supra*, 444 U.S. at 605-06, defined a "seniority system" as "a scheme that, alone or in tandem with non-'seniority' criteria, allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase" (footnotes omitted). Thus, it is clear that the layoff policy herein falls within this definition *regardless* of the enforceability of the collective bargaining agreement under Tennessee law. Since the system was adopted and applied without a discriminatory purpose, it is immunized from attack by Section 703(h). In any event, both Congress and the courts that have addressed the issue have recognized that a seniority system need not be the result of collective bargaining in order to receive the protections of Section 703(h). *See* 110 Cong. Rec. 6566 (1964) ("[T]itle VII does not permit the ordering of racial quotas in businesses or unions and does not permit interferences with seniority rights of *employees* or union members") (emphasis added); *id.*, at 11486 ("The bill does not permit the Federal Government to destroy the job seniority rights of either *union or nonunion employees*") (emphasis added); *Williams v. New Orleans*

Numerous circuit courts of appeals have given effect to the clear Congressional intent to protect bona fide seniority systems where layoffs were conducted pursuant to a "last-hired, first-fired" seniority system. *See Chance v. Board of Examiners & Bd. of Ed.*, 534 F.2d 993, 997 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977); *Watkins v. Steel Workers of Am., Local No. 2369*, 516 F.2d 41, 49 (5th Cir. 1975); *Jersey Central Power & Light Co. v. Local Union 327*, 508 F.2d 687, 710 (3d Cir. 1975), *cert. denied*, 425 U.S. 998 (1976); *Waters v. Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309, 1318 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976).[11] *But see Boston Chapter, NAACP v. Beecher*, 679 F.2d 965, 974-75 (1st Cir. 1982), *remanded for consideration of mootness*, 51 U.S.L.W. 4566 (U.S. May 16, 1973). The decision of the Sixth Circuit in this case conflicts with the unequivocal intent of Congress and the reasoning of this Court and

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Steamship Ass'n, 673 F.2d 742, 754 n.19 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 1428 (1983); *EEOC v. E.I. du Pont de Nemours & Co.*, 445 F. Supp. 223, 248 (D. Del. 1978). In addition, "if section 703(h) immunity applies exclusively to collectively bargained seniority systems, then only the 20 percent of the civilian labor force represented by labor unions would be covered by such statutory exemption." Malinowski, The *Teamsters* 703(h) Exemption: Does It Apply to Non-union Employers? 7 Empl. Rel. L. J. 210, 221 (1981).

[11] The Sixth Circuit prior to the instant case had split on the issue of whether a consent decree should be modified to prevent layoffs pursuant to seniority. *Compare Brown v. Neeb*, 644 F.2d 551 (6th Cir. 1981) *with Youngblood v. Dalzell*, 568 F.2d 506 (6th Cir. 1978). It should be noted that *Brown* did not involve allegations of discrimination under Title VII so that the court did not reach the issue of whether Section 703(h) immunized from challenge layoffs pursuant to a bona fide seniority system. 644 F.2d at 564.

the above circuit courts of appeal that a bona fide seniority system which results in an adverse effect against blacks does not violate Title VII in the absence of intentional discrimination in the adoption or maintenance of the system.

It is indisputable that minority employees often possess less seniority, and that neutral and bona fide seniority systems may have a disproportionate effect on the employment opportunities of such employees. As noted above, Congress recognized that such neutral bona fide seniority policies could have a disparate effect upon more recently hired minority members, but determined that the protection of bona fide seniority systems was of overriding importance.[12] As a resolution of these competing interests, Congress determined that discriminatees could obtain full "make whole" relief, including retroactive seniority, *Franks v. Bowman Transp. Co., Inc.*, *supra*, 424 U.S. 747, "without attacking the legality of the seniority system as applied to them." *Teamsters*, *supra*, 431 U.S. at 347. Thus, it is clear that under this Court's holdings in *Franks* and *Teamsters*, and after a hearing and appropriate findings of discrimination against particular individuals, the district court could have

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[12] Congressional deference to the rights secured by seniority systems has been recognized by this Court in a variety of contexts. *See, e.g., Trans World Airlines, Inc. v. Hardison*, *supra*, 432 U.S. 63 (requirement of § 701(j) of Title VII that employers and unions reasonably accommodate employees' religious practices, absent undue hardship, does not require abrogation of other employees' collectively-bargained seniority rights); *California Brewers Ass'n v. Bryant*, *supra*, 444 U.S. 598 (a seniority system's "ancillary rules" do not fall outside the protections of § 703(h) simply because they do not "operate on the basis of some factor involving the passage of time.")

awarded "rightful place" retroactive seniority to those individuals and slotted them into the seniority system. This would have served fully the remedial purpose of Title VII without setting aside a bona fide, neutral seniority system. In the absence of a finding of intentional discrimination in the adoption or maintenance of the seniority system, however, the court was without authority to abrogate the seniority system itself as it attempted to do herein.

As this Court noted in *Patterson*, *supra*, 456 U.S. at 76-77:

> Congress was well aware in 1964 that the overall purpose of Title VII, to eliminate discrimination in employment, inevitably would, on occasion, conflict with the policy favoring minimal supervision by courts and other governmental agencies over the substantive terms of collective bargaining agreements (citation omitted). Section 703(h) represents the balance Congress struck between the two policies, and it is not this Court's function to upset that balance (footnote omitted).

Accordingly, this Court should not interfere with the operation of the bona fide seniority provision in the instant case. *Teamsters* and its progeny clearly dictate that the "last hired, first fired" layoff policy adopted by the City is protected by Section 703(h).

II. NONE OF THE REASONS ADVANCED BY THE COURT OF APPEALS JUSTIFIES THE ABROGATION OF THE BONA FIDE SENIORITY SYSTEM HEREIN

Neither the reasons set forth by the court of appeals for the modification of the consent decree herein, nor for overriding the bona fide seniority system are persuasive. By approving the district court order,

the court of appeals ignored the plain meaning of Section 703(h) and its Congressional intent and abrogated the legitimate expectations of nonminority employees who were affected by the layoffs.

The court of appeals stated that a consent decree may be modified either in accordance with basic contract principles or upon changed circumstances. 679 F.2d at 560-61. With regard to the court's contract theory of modification, it is clear that the court did not seek merely to modify the decree to reflect the intent of the parties, but rather it undertook to rewrite the terms of the decree to achieve an objective which both the City and the Union opposed. Thus, it is clear that in the absence of a full hearing and a finding by the court of intentional discrimination in the adoption or maintenance of the seniority system, the district court was without authority to override the bona fide seniority policy.

In *United Sates v. Armour & Co.*, 402 U.S. 673, 681-82 (1971), this Court stated that consent decrees:

> cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, *the scope of a consent decree must be discerned within its four corners*, and not by reference to what might satisfy the purposes of one of the parties to it (emphasis added).

In this instance, the obligations and the intentions of the parties should be judged by reference to the "four corners" of the 1974 and 1980 consent decrees. Since the 1980 consent decree was "not intended to

conflict with any provisions" of the 1974 decree, but rather was intended to "parallel and supplement" the earlier decree (App. 60), the Court properly should look to the 1974 as well as the 1980 decrees as indicators of the parties' intent. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975).

Neither the 1974 nor the 1980 decrees provided any mechanism for layoffs, reductions in rank or recalls. The 1974 decree expressly stated that the hiring goals applicable to the Fire Department "are subject to the anticipated budgeted vacancies in the City" (J.A. 105). The 1974 decree also recognized the appropriateness of the use of city-wide seniority in the context of promotion, transfer and assignment. *Id.*, at 103. In addition, the 1980 decree provided that the "[g]oals established herein are to be interpreted as objectives which require reasonable, good faith efforts on the part of the City, and not as rigid quotas" (App. 64). The major thrust of both the 1974 and the 1980 decrees was the hiring and promotion of blacks. In this regard, approximately 56% of new hires and 16-17% of promotions since the 1974 consent decree were black (J.A. 48). The layoffs which were enjoined would have reduced the proportion of blacks in the Fire Department by only one percent (J.A. 54). Finally, the mayor testified that he would not have entered into a consent decree which provided for layoffs in a manner that was inconsistent with the union agreement herein (J.A. 37-38).[18]

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[18] In fact, the City likely would have incurred liability had it attempted to alter the collective bargaining agreement in the absence of the consent of the Union. *See W.R. Grace & Co. v. Local Union 759*, 51 U.S.L.W. 4643, 4647 (U.S. May 31, 1983).

Under these circumstances, even if a district court had the authority to modify a consent decree to abrogate a bona fide seniority policy, it simply cannot be said that there was any implied or explicit contractual obligation on the part of the City to conduct layoffs in a manner inconsistent with its express "last hired, first fired" policy. While layoffs pursuant to seniority would have entailed a modest temporary setback to the City's obligations under the decrees, this alone was not sufficient ground for overriding the seniority system.

The court of appeals' second rationale for altering the terms of the consent decree to prohibit layoffs based on seniority was that a court of equity can order such changes based on "changed circumstances." In the instant case, however, there was already in existence a mechanism to meet the "changed circumstances" arising from the necessity of layoffs—*i.e.*, the last-hired, first-fired seniority system—and that mechanism is *expressly* protected by Title VII. Thus, in the absence of a finding that the layoff policy was intentionally discriminatory, the district court was without authority to abrogate the seniority system. The fact that Section 703(h) expressly sanctions the method of layoffs used by the City renders inapposite cases where "changed circumstances" have "transformed the original decree into an instrument of wrong." 679 F.2d at 563, *citing United States* v. *Swift & Co.*, 286 U.S. 106, 114-15 (1932); *Hughes v. United States*, 342 U.S. 353 (1952).

The court of appeals' reasons for concluding that "[a] court does not abuse its discretion in modifying or approving a consent decree which conflicts with the provisions of a collective bargaining agreement," 679 F.2d at 564, all rest on the thesis that the parties

have agreed to a consent decree which contains an alteration of existing seniority provisions. Whatever validity these theories may have when the parties have agreed to such a decree, it is clear that they are wholly inapplicable when the union and the employer opposed such a modification. *See United States v. City of Miami*, 664 F.2d 435, 447, 452 (5th Cir. 1981). In the absence of agreement to the changes, a seniority provision can be altered only after an adjudication that the seniority provision was adopted or maintained with a discriminatory intent.

Sections 1981 and 1983 provide no basis for upholding the decision of the court of appeals. Since the district court expressly found that the seniority system at issue was not adopted with an intent to discriminate (App. 73), neither Sections 1981 nor 1983 could have been violated. *See, e.g., General Building Contractors Ass'n v. Pennsylvania*, 102 S.Ct. 3141, 3146-50 (1982). Since 42 U.S.C. § 1988 directs courts to enforce § 1981 "in conformity with the laws of the United States, so far as such laws are suitable," the protections afforded such seniority systems under Title VII similarly obtain under Section 1981. *See, e.g., Wattleton v. International Brotherhood of Boiler Makers*, 686 F.2d 586, 592 (7th Cir. 1982), *cert. denied*, 103 S.Ct. 1199 (1983); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1191 n.37 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); *Johnson v. Ryder Truck Lines, Inc.*, 575 F.2d 471, 474 (4th Cir. 1978), *cert. denied*, 440 U.S. 979 (1979); *Chance v. Board of Examiners & Bd. of Ed., supra*, 534 F.2d at 998; *Waters v. Wisconsin Steel Works of International Harvester Co., supra*, 502 F.2d at 1320 n.4.

Finally, the decision of the court of appeals finds no support in this Court's decision in *United Steelworkers v. Weber*, 443 U.S. 193 (1979). Contrary to the plan in *Weber*, the instant modification of the seniority system was *not* voluntary; it would require the discharge of innocent white employees who possessed greater seniority than blacks who were retained; and it was designed to *maintain* a racial balance. Thus, the instant order fails to meet the criteria which this Court established in *Weber*, 443 U.S. at 208-09, for voluntary affirmative action plans.

Moreover, in *Ford Motor Co. v. EEOC*, *supra*, 102 S.Ct. at 3069, this Court confirmed that Title VII permits the courts to consider the rights of "innocent third parties." *See also City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 723 (1978); *Teamsters*, *supra*, 431 U.S. at 371-76. Again citing the "overriding importance" of seniority rights, this Court in *Ford* stated that "we should be wary of any rule that encourages job offers that compel innocent workers to sacrifice their seniority to a person who had only claimed, but not yet proven, unlawful discrimination." 102 S.Ct. at 3070. In the instant case, not only have the plaintiffs not proven unlawful discrimination, but the use of a "last hired, first fired" seniority plan expressly was approved by Congress and protected by Section 703(h). Under these circumstances, the Court should not interfere with the expectations of innocent third parties and should hold that the instant seniority policy was improperly set aside by the courts below.

III. THE DECISION OF THE COURT OF APPEALS WILL DISCOURAGE THE SETTLEMENT OF EMPLOYMENT DISCRIMINATION CASES

This Court has recognized on a number of occasions that voluntary compliance is the preferred means of eliminating employment discrimination. *See, e.g., W.R. Grace & Co. v. Local Union 759, supra,* 51 U.S.L.W. at 4647; *Ford Motor Co. v. EEOC, supra,* 102 S.Ct. at 3064; *Carson v. American Brands, Inc.,* 450 U.S. 79, 88 n.14 (1981); *United Steelworkers v. Weber, supra,* 443 U.S. at 203-04; *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 44 (1974); H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, p. 18 (1963); U.S. Code Cong. & Admin. News (1964), pp. 2355, 2393. In addition, employers are encouraged to " 'self-examine and self-evaluate their employment practices [under Title VII] and to eliminate, so far as possible, the last vestiges' of their discriminatory practices." *Teamsters supra,* 431 U.S. at 364. Employers thus have viewed the settlement of employment discrimination cases as not only a means of defining and perhaps limiting their potential liability, but also as a means of effecting the purposes of Title VII.

The decision of the court of appeals herein not only modified the consent decree to impose obligations on the City which were not agreed to in either the 1974 or the 1980 decrees, but it also overrode the obligation of the City under its Memorandum of Understanding with the Union regarding layoffs by seniority. By granting to the district court the authority to impose additional obligations which are not agreed to by parties to a consent decree, the decision eliminates the certainty of obligation that has proven to be a major incentive to settlement of employment discrim-

ination cases and will discourage such settlements in the future.[14]

In addition to the chilling effect which the Sixth Circuit's decision is likely to have on the willingness of employers to enter into consent decrees, it also is likely that the decision will encourage labor unions to object to the entry of consent decrees, even where their interests are not implicated directly. If consent decrees, such as those entered herein in 1974 and 1980, which related primarily to hiring and promotion and which are silent regarding layoffs, can be modified to abrogate a bona fide seniority system, it is likely that many unions will choose to oppose the entry of such decrees. This, combined with the reluctance which employers may have to enter into agreements that do not define clearly and limit their obligations, may have a detrimental effect on the settlement process and interfere with the substantial gains which minorities and women have realized through the entry of consent decrees.

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[14] Neither employers nor unions have any interest in losing minority or nonminority workers. The current economic climate and the resulting layoffs are beyond the control of any single employer, union or group of workers; the alternatives to seniority-based layoffs are not always workable organizationally; a significant majority of workers have viewed and will continue to view seniority-based layoffs as the preferred alternative; and the problem, by law, is one properly within the sphere of the collective bargaining process. As recognized by this Court, "Congress passed the Civil Rights Act of 1964 against the backrop of this Nation's long-standing labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment." *California Brewers Ass'n v. Bryant, supra,* 444 U.S. at 608.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Sixth Circuit herein should be reversed.

Respectfully submitted,

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Nos. 82-206 and 82-229

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FIREFIGHTERS LOCAL UNION NO. 1784,
Petitioner,
v.
CARL W. STOTTS, *et al.*,
Respondents,
and
MEMPHIS FIRE DEPARTMENT, *et al.*,
Petitioners,
v.
CARL W. STOTTS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, AS AMICUS CURIAE

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, AS AMICUS CURIAE

INTEREST OF THE IAFF AS AMICUS CURIAE *

The International Association of Fire Fighters, AFL-CIO (IAFF) is an unincorporated association comprised of municipal, state, and federal fire fighters throughout

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* This brief is filed with the consent of all parties. The letters of consent have been filed with the Clerk of the Court.

the United States and Canada. The current membership includes approximately 153,000 state and municipal fire fighters employed by states, cities, and towns across the United States.

The IAFF's objectives include promoting and securing improved wages, hours, and working conditions of fire fighters through collective bargaining, legislation, legal action, and other appropriate means.

The IAFF here represents the interests of its many members across the country who are facing, or may face, the prospects of layoffs caused by fiscal exigencies such as those which were carried out by the City of Memphis, and who are employed pursuant to seniority systems established by state and/or local laws, policies and practices.

The prospects of reductions-in-force in these jurisdictions are not merely conjectural. In a report issued by the Bureau of National Affairs, figures released showed that layoffs of state workers occurred in fiscal year 1981 in 43 of the 50 states, while in fiscal 1982, 44 states either experienced layoffs or anticipated them by the end of the year. "Layoffs, Rifs, and EEO in the Public Sector, A BNA Special Report," Government Employee Relations Report, GERR No. 949, February 8, 1982, pp. 13-15.

The financial situation among local governments similarly indicates a stark outlook. In a survey of 100 cities, 62 laid off or were expecting to layoff employees in fiscal year 1982. Many of these jurisdictions are covered by civil service laws which contain seniority-based layoff provisions that determine the order in which employees will be furloughed in work force reductions. Like Memphis, many cities whose firefighters are members of the IAFF have also entered into consent decrees to settle employment discrimination lawsuits. Government Employee Relations Report, supra, at 23-36. There is no indication that the financial problems of state and local governments

will significantly improve in the near future, and the prospects for continued reductions-in-force remain substantial.

ISSUES TO BE COVERED IN THE BRIEF AMICUS CURIAE

This brief addresses a central question in this case: May a federal court grant special layoff protection to junior minority employees who are not identified victims of discrimination, and thereby cause the layoff of innocent senior white employees, simply because layoffs in accordance with a bona fide seniority system would delay the attainment of minority employment goals agreed to in a consent decree?

The minority-conscious percentage goals which constituted the justification for the lower courts' rulings stemmed from settlements in two employment discrimination cases challenging hiring and promotion practices in the City of Memphis. Both cases were settled without any findings of discrimination by the District Court and both settlements contained a specific disclaimer of any wrongdoing by the City. The consent decrees memorializing the settlement terms set long term hiring goals for minorities in the various City departments, including the Fire Department, recognizing the attainment of these goals to be "subject to the anticipated budgeted vacancies in the City." Union Pet. 3, fn. 3. They further provided that for purposes of promotion, transfer and assignment, total City-wide seniority, rather than departmental seniority, of individual employees would be considered. No retroactive or constructive seniority was awarded by either decree and neither layoffs, reductions in rank nor recall rights were covered. Union Pet. App. A59-A69; Joint App. 98-115.

The instant proceeding was triggered by a shortfall in City finances in the spring of 1981, which the City proposed to cure by a reduction in personnel in all City departments. Since 1973, the City had in place a seniority

system which utilized an employee's initial date of hire with any City department as the basis for the accrual of seniority for all purposes.[1] No layoffs having been contemplated before 1981, the City had not before promulgated a specific layoff policy, although its memoranda of understanding with various labor organizations, including Firefighters Local 1784, did provide for layoffs to occur on a last-hired, first-laid-off basis.[2] Joint App. 37-38, 49. In 1981, the City did promulgate such a policy. Joint App. 82-96. That policy called for an intricate seniority-based procedure for lay-offs and recalls which may be summarized as follows:

> 3. Seniority Determination
>
> A. Layoffs shall occur within a classification, based upon city-wide seniority which shall be determined on the basis of actual date of continuous service from the latest date of permanent employment. . . .
>
> B. When an employee's position in a given classification is abolished or eliminated, the employee occupying that position shall have the right to bump the least senior employee within that classification city-wide, or go on layoff status. . . .
>
> D. Employees who are unable to bump into their own classification but who have obtained permanent status in a previously held city-funded classification have the option to bump, in lieu

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[1] This policy was incorporated into the 1974 decree as well as the City's labor memoranda with petitioner Firefighters Local Union No. 1784. Union Pet. App. A80; Joint App. 37-38, 49.

[2] The Memorandum of Understanding with Local 1784 provided:

> In the event it becomes necessary to reduce the Fire Division, seniority alphabetically shall govern lay-offs and recalls. Employees lowest in seniority shall be laid off first and shall be the last to be recalled. Members laid off shall be given thirty (30) days notice prior to the effective date of lay-off.

Joint App. 119.

> of being laid off, the least senior employee in a city-funded position in that same classification.
>
> * * * *
>
> 6. Recall Procedure
>
> When a job is to be filled in a given classification, it shall be offered to the most senior employee within the same classification who is on the layoff roster. Vacancies shall continue to be offered according to descending order on the roster.

Joint App. 85, 86, 89.

The City's layoff policy was not adopted with a discriminatory purpose. Union Pet. App. A11, A73, A78. The application of the policy in 1981 did however have an adverse impact on some minority employees. Those who had benefitted from the earlier consent decrees by being hired by the Fire Department had been accorded seniority as of their dates of entry into the City's workforce. They had not been found to be victims of discrimination and had received no rightful place seniority relief in the decrees. Thus, seniority-based reductions in force, concededly neutral, affected these minority workers in greater numbers than non-minority employees with earlier dates of hire.

The Court of Appeals rejected the District Court's conclusion that this effect of the seniority-based layoff system rendered the system non bona-fide. Union Pet. App. A11, A41, A46. *A fortiori* it is a bona fide seniority system on this record.[3]

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[3] The Court of Appeals found it unnecessary to decide whether the City's agreement with Local 1784 containing a seniority-based layoff provision is valid under Tennessee law. The legality of that agreement is not controlling because the City itself decided to implement a seniority-based layoff procedure for handling personnel reductions City-wide in any event.

While it is true that in most cases the terms of a seniority system are embodied in a collective bargaining agreement between an employer and a union, neither Title VII, its legislative history, nor the decisions of this Court in any way indicate that a system uni-

Carl Stotts and Fred Jones, plaintiffs in one of the earlier cases who had been hired into the Fire Department prior to either of the earlier decrees, returned to the District Court seeking modification of the 1980 Decree to prevent these layoffs. Otherwise, plaintiffs argued, the gains achieved under the decrees would be vitiated by virtue of the disproportionate number of minorities who possessed insufficient seniority to avoid the layoffs. The District Court approved the relief requested by Stotts and Jones, enjoining the neutral implementation of the City's seniority system in order to accord minority employees special layoff protection at the expense of innocent senior white employees, who consequently lost their jobs. The Court of Appeals affirmed.

The purpose of this brief *amicus curiae* is to explore the ramifications of the lower court's modification of the

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laterally adopted by an employer without a discriminatory purpose cannot also be bona fide and therefore enjoy Section 703(h), 42 U.S.C. § 2000e-2(h), protection. See *Williams v. New Orleans Steamship Ass'n.*, 673 F.2d 742, 754 fn. 19 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 1428 (1983); *EEOC v. E.I. duPont de Nemours & Co.*, 445 F. Supp. 223, 248 (D.Del. 1978). "That a current employee expects to have certain seniority rights because of a plan adopted at the employer's initiative, as opposed to a plan negotiated between labor and management, in no way diminishes that employee's expectations and it is those expectations which Section 703(h) was designed to protect." *EEOC v. E.I. duPont de Nemours & Co.*, 445 F. Supp. at 249. See also, *Cartagena v. Secretary of the Navy*, 618 F.2d 130, 134 (1st Cir. 1980) (Federal Personnel Manual promotion provision deemed bona fide seniority system); *Early v. Klassen*, —— F. Supp. ——, 15 FEP Cases 297 (D.D.C. 1977) (Postal Service tour of duty selection policy based on seniority deemed bona fide under § 703(h)); *Johnson v. Burroughs Corp.*, —— F. Supp. ——, 24 FEP Cases 963 (S.D. Fla. 1980) (Employer's unilaterally imposed seniority policy deemed bona fide under § 703(h)); *Campbell v. Washington*, —— F. Supp. ——, 24 FEP Cases 707, 713 (D.D.C. 1979) (Civil Service guidelines prescribing reduction in force procedures by seniority found bona fide under § 703(h)); *Bacica v. Board of Ed. of Sch. Dist. of the City of Erie, Pa.*, 451 F. Supp. 882, 886-7 (W.D. Pa. 1978) (seniority list neutrally employed by employer deemed bona fide).

1980 consent decree to override layoffs on a last-hired, first-laid off basis pursuant to a *bona fide* seniority system by granting a special layoff protection to minority employees solely because of their race and to show that the lower court's action in these circumstances exceeded the well-established limitations within which the federal judiciary must operate.

ARGUMENT

I.

The lower courts enjoined the routine operation of the Memphis seniority system solely because its impact retarded the attainment of minority percentage goals set forth in a consent decree. No claim was made that the system was being utilized intentionally to frustrate the decree. No claim was made that the City was using seniority based layoffs as a device to renege on its obligations under the decree. The District Court specifically found that "neither the layoffs nor the [layoff] policy adopted was intended to be discriminatory." Union Pet. App. A73, A78. Although minority percentage goals have not yet been achieved, this is in no way due to a lack of compliance. In the District Court, there was "no suggestion that [the City had] been contemptuous." Union Pet. App. A75. Despite its financial crisis, the City remained committed to maintaining an employment scheme free from racial discrimination. Faced with a financial need to cutback its workforce, the City relied on "the thing that has been used in every city in this country, in every business in this country, and by the city, and in the Consent Decree since 1974, and that is the seniority policy in the union agreement. . . ." Joint App. 37-38.

This Court too has long recognized the "vast and increasing importance" of seniority in this country's system of employment. *Franks v. Bowman Transportation Company, Inc.*, 424 U.S. 747, 765 (1976). "Competitive status" seniority, which determines "who gets or who

keeps an available job" in a layoff situation, has been described by this Court to possess "overriding importance" because it affects the economic security of an employee more than any other term or condition of employment. *Id.* at 766. See *American Tobacco Company v. Patterson*, 456 U.S. 63 (1982).

Congress has immunized the routine application of systems of competitive seniority which have been created or operated without a racially discriminatory purpose from the statutory prohibitions against employment practices which, although neutral on their face and in intent, nonetheless discriminate in effect against a particular group. *Teamsters v. United States*, 431 U.S. 324, 348-354 (1977). "[T]he unmistakable purpose of § 703(h) [of the Civil Rights Act of 1964] was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." 431 U.S. at 32.[4] In so holding in *Teamsters*, the Court placed its imprimatur on the validity of a practice whereby the longest tenured employees, even though they might without exception be white, would enjoy a " 'disproportionate distribution of advantages [which] in a very real sense [would] operate to 'freeze' the status quo of prior discriminatory employment practices' " (431 U.S. at 350). *Teamsters* acknowledged that this perpetuation effect could not overcome

[4] This Court has interpreted the term "seniority system" to mean "a scheme that . . . allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase." *California Brewers Association v. Bryant*, 444 U.S. 598, 605-606 (1980). "The example of a 'seniority system' most frequently cited in the congressional debates was one that provided that the 'last hired' employee would be the 'first fired.' " *Id.* at 605, fn. 10.

There can be no serious dispute that the provisions of the Memphis plan represent what this Court has considered "the core concepts of 'seniority.' " *Id.* at 606. Rights of employees are determined solely according to length of employment. The principal feature of the Memphis system, "like any and every 'seniority system' is that preferential treatment is dispensed on the basis of some measure of time served in employment." *Id.*

"the congressional judgment . . . that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees. . . ." 431 U.S. at 353.[5]

Furthermore, although other civil rights laws do not contain any similar specific protective language, a seniority system which is neither discriminatory in genesis nor application is lawful under both the U.S. Constitution and the Civil Rights Act of 1866, 42 U.S.C. § 1981, which invalidate only employment practices discriminatory in their purpose as well as their effect. See *Washington v. Davis*, 426 U.S. 229 (1976) (Fourteenth Amendment); *General Building Contractors Association, Inc. v. Pennsylvania*, —— U.S. ——, 73 L.Ed.2d 835 (1982) (Section 1981). See also, *Johnson v. Ryder Truck Lines*, 575 F.2d 471 (4th Cir. 1978), *cert. denied*, 440 U.S. 979 (1979); *Waters v. Wisconsin Steel Works of Int'l. Harvester Co.*, 502 F.2d 1309, 1320 n.4 (7th Cir. 1974), *cert. denied*. 425 U.S. 997 (1976).

Under these principles, the Memphis seniority system could not have been altered had its effects been challenged in a new action instituted and resolved on the same record before the lower courts as to the system's origins and purpose. Because its effects impacted on the terms of a prior consent decree however—the routine application of the system's "last-hired, first-laid off" provisions would have resulted in some minority employees hired by virtue of the remedial measures contained in the earlier consent decree temporarily losing their jobs—the district court deemed itself empowered to grant the injunction.

This effect of the seniority system, and this effect alone—i.e., the temporary delay in the complete realization of the voluntarily-agreed upon quotas in the work-

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[5] It is of no legal consequence that the City's seniority system was adopted after the passage of the Act. *American Tobacco Company v. Patterson, supra.*

force—became the linchpin for the modification of the consent decree to enjoin the routine operation of the system. In these circumstances, such relief was beyond the court's authority to grant.

II.

A federal court's powers in equity of course are not boundless. In formulating its remedial decree, a court in equity must "look to the practical realities and necessities inescapably involved in reconciling competing interests" regardless of the source of those interests. *Lemon v. Kurtzman*, 411 U.S. 192, 201 (1973). This is especially the case "when immediate implementation of an equitable remedy threatens to impinge upon the expectations of innocent parties." *Teamsters*, 431 U.S. at 375.

Where, as here, private litigants seek relief pursuant to federal statutes, the court's authority to fashion relief is further circumscribed by the limitations of the applicable statute, for its authority "comes only from the statute which [its] decree is intended to enforce." *System Federation No. 90 v. Wright*, 364 U.S. 642, 651 (1964). See *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 457 (1957); *Wheeldin v. Wheeler*, 373 U.S. 647, 651-652 (1963). Thus, a court concerned that harm has occurred is without authority to exercise its injunctive powers if the harm is the result of an act which is protected by statute. See, *TVA v. Hill*, 437 U.S. 153, 195 (1978) ("[I]n our constitutional system, the commitment to the separation of powers is too fundamental for [the courts] to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.'").

A federal court asked to modify a consent decree is further circumscribed in its authority by the scope of the decree itself. "[T]he scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. . . . and not as it might have been written had the

plaintiff established his factual claims and legal theories in litigation." *U.S. v. Armour & Company*, 402 U.S. 673, 681-682 (1971).[6]

Applying these principles to the case at hand, the lower court's holding simply does not stand up. First of all, the consent decree itself did not treat layoff protection or recall rights. It had as its objective a percentage increase in the number of minority employees in the ranks of the Fire Department. The agreed-upon means for attaining this objective was through the hiring and promotion processes—not through any program of seniority adjustment or firing of existing non-minority employees. There being no reference to layoffs, the decree must be interpreted as placing no restrictions on treatment of minority applicants once hired into the workforce any differently from other employees when layoffs become necessary.

The relief granted in the form of modification of the decree was wholly new to the terms of the compact and did not enjoy the blessing of both parties to the decree. The additional relief awarded by the District Court was

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[6] Even if no settlement had been achieved originally and the allegations in the complaint had been proven at trial, the relief the district court might have granted would have been limited "by the nature and extent of the . . . violation." *Milliken v. Bradley*, 418 U.S. 717, 744 (1974). See, *Hills v. Gautreaux*, 425 U.S. 284, 294 (1976). The complaint alleged hiring and promotion discrimination. Backpay and rightful place seniority for those persons able to prove they were denied hire or promotion on account of their race appropriately would cure the proven practice of the employer to intentionally refuse to hire or promote particular black persons. This individualized focus of laws protecting against employment discrimination has been analyzed and approved by this Court on numerous occasions. Title VII: *Franks v. Bowman Transportation Co., supra*; *Teamsters v. United States*, 431 U.S. at 357-377; *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 718 (1978); *Connecticut v. Teal*, —— U.S. ——, 73 L.Ed.2d 130, 141 (1982). Fourteenth Amendment: *Washington v. Davis*, 426 U.S. at 239. Section 1981: *General Building Contractors Association, Inc. v. Pennsylvania*, —— U.S. ——, 73 L.Ed.2d at 846-849.

in no sense voluntary.[7] It was rather, as conceded by the Court of Appeals, an effort to fill a gap overlooked by the respondents when the settlement was originally negotiated. Such gap-filling is totally inconsistent with the teachings of this Court in *Armour*.

Furthermore, no proper policy consideration underlies the modification. The Court of Appeals found the "strong policy favoring voluntary settlements" underlying Title VII to allow the seniority system to be overridden despite its acknowledged bona fides. Certainly such a policy favoring settlements exists—but so does an even stronger explicitly expressed policy protecting seniority.

This certainly is not a case where the statute is ambiguous so that one might reasonably question whether Congress intended to allow a seniority-override remedy here. Cf. *Transamerica Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639-640 (1981). *Mortgage Advisors v. Lewis*, 444 U.S. 11 (1979). As shown earlier, Title VII on its face is explicit in its directive that the operation of a legitimate seniority system is inviolate and shall not be overridden despite any disparate impact it may cause. The proposition that voluntary compliance is preferable to litigation simply cannot justify a federal court shunting a clearly expressed legislative protection because the court perceives the equities of a case before it to so dictate. Nevertheless, that is precisely the crux of the lower courts' reasoning. App. A38.

The relief granted—requiring the maintenance of separate minority and nonminority lists with respect to seniority for layoffs and recall—was not designed to be that type of constructive seniority relief sanctioned by

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[7] It did not represent judicial approval of an agreement between the parties as was involved in *Bakke* (*University of California Regents v. Bakke*, 438 U.S. 265 (1978)) and *Weber* (*United Steelworkers of America v. Weber*, 443 U.S. 193 (1980)) both of which dealt with the legality of racial preferences in voluntary affirmative action programs.

this Court's opinion in *Franks*. Union Pet. App. A38. Consequently, minority employees not themselves victims of discrimination have been afforded relief by the district court as if they were. As beneficiaries of the affirmative action contained in the consent decree merely by virtue of their race, these employees had no basis for claiming any additional seniority or layoff protection. The district court's order granting it to them anyway contravenes Section 706(g) of the Act. 42 U.S.C. 2000e-5(g).

Furthermore, in this sense, the district court's order is not remedial. Rather than designed to safeguard the relief awarded individuals who have been subjected to discrimination—i.e. ensuring the "make whole" objective is met—the district court's order rewards non-victims of discrimination at the expense of innocent employees. These non-victims, all of whom now enjoy superseniority for purposes of layoff, have been placed in positions *higher* than they would have occupied had discrimination actually been proven. Their rightful place, as non-victims, was precisely where they stood prior to modification of the decree. Absent some individualized determination to the contrary, no proper equitable basis existed to place them anywhere else.

Finally, regardless of the purported statutory or Constitutional basis for the lower courts' decisions, the fact remains that the lone rationale for the decisions is not discrimination—it is race. We reiterate that no finding of discrimination has ever occurred in this case. The only reason respondents were kept working for the Memphis Fire Department while their more senior fellow employees were sent home is because respondents are black and their colleagues are white. Basic principles of equity do not justify taking a job away from an innocent employee so to create a position for another who has suffered no discrimination and whose only credential for the award is that he was born a different color.

In *Teamsters* the Court called for resort to the "qualities of mercy and practicality" in devising a remedy where the restoration of victims of discrimination is weighed against "the legitimate expectations of nonvictim employees." 432 U.S. at 374-375. Where, as here, there are nonvictims on both sides of the scale, awarding preferences to one based solely on race renders the burden on the other all the more onerous. Cf. *Ford Motor Co. v. EEOC*, — U.S. —, 73 L.Ed.2d 721, 737-738 (1982). In this situation, the "qualities of mercy and practicality" emphasized in *Teamsters* do not justify the relegation of non-minority employees to the unemployment lines. Unfortunately this is a consequence of the lower court's analysis which seems to have eluded its consideration.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

This brief will address the following questions:

(1) Whether the correctness of a preliminary injunction prohibiting the City of Memphis in May 1981 from reducing by layoffs or demotions the percentage of blacks then occupying certain positions in the Memphis Fire Department is moot where all the firefighters laid off or demoted by Memphis in 1981 have been restored to their former positions and the preliminary injunction has expired.

(2) Whether a preliminary injunction prohibiting the City of Memphis in May 1981 from reducing by layoffs or demotions the percentage of blacks then occupying certain positions in the Memphis Fire Department exceeded the district court's inherent authority to modify a prior consent decree to preserve the relief granted therein.

(3) Whether § 706(g) of the Civil Rights Act of 1964 authorizes race-conscious relief for systematic employment discrimination.

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys in the national effort to assure civil rights to all Americans. The Committee membership today includes several former presidents of the American Bar Association, several law school deans, and many of the nation's leading lawyers.

The Committee conducts an extensive litigation program against employment discrimination, representing both government employees and private-sector employees. In some of its cases, consent decrees and adjudicated decrees have been entered that provide race-conscious affirmative relief to remedy an employer's past systematic discrimination. We have previously addressed the legality of race-conscious affirmative action in our *amicus* briefs filed in *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), and *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974).

The Committee submits this brief primarily to develop two points that petitioners and their supporting *amici* overlook in arguing that Title VII does not authorize the federal courts to grant race-conscious relief: first, resolution of their contentions is inappropriate because the preliminary injunction at issue here is moot; and second, the question on the merits is not whether Title VII authorizes the preliminary injunction at bar but whether the district court abused its discretion in exercising its inherent authority to modify a consent decree. We also show that Title VII does authorize race-conscious relief.

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[1] The parties' letters of consent to the filing of this brief are being filed with the Clerk pursuant to Sup. Ct. Rule 36.2.

SUMMARY OF ARGUMENT

1. *Mootness.* The preliminary injunction at issue is moot. That order enjoined the City of Memphis in May 1981 from reducing, by layoffs or demotions, the percentage of blacks then occupying certain positions in the Memphis Fire Department. The City complied with this injunction in making layoffs and demotions within the Department. Subsequently, the City restored all the Memphis firefighters who were laid off or demoted to their former positions. Thus, the preliminary injunction at issue here has been irrevocably carried out, and no person's employment is at stake.

Petitioners have suggested that the expired preliminary injunction should be reviewed because the formerly laid-off firefighters lost seniority credit during the layoff period. But no firefighter has made any claim for restoration of seniority credit, and Tennessee law would not recognize such a claim. Even if a controversy over seniority credit did exist in some forum, such a controversy is not before this Court and hence would not justify review of the moot injunction. Moreover, the expired injunction, whether affirmed or reversed, would not constitute a defense for the City against claims by formerly laid-off firefighters for restoration of lost seniority. *W.R. Grace & Co.* v. *Local Union 759*, 51 U.S.L.W. 4643 (U.S. May 31, 1983).

The expired preliminary injunction is not justiciable as an order "capable of repetition, yet evading review." There is little chance that the 1981 layoffs, unprecedented in Memphis history, will recur. And even if Memphis firefighters are laid off in the future, those layoffs are not apt to be constrained by injunctive relief such as that challenged here. With the passage of time and even modest progress toward the goals of the consent decree, there will be no basis for enjoining seniority-based layoffs. Moreover, the preliminary injunction at bar is not inherently evasive of review. If the petitions for certiorari had not been held pending disposition of

a similar case, this case would likely have been decided prior to the recall of the laid-off firefighters. In addition, it was fortuitous that attrition and retirement permitted recall of all the laid-off firefighters prior to expiration of their 2-year recall rights, thus mooting the issue of the correctness of the injunction.

2. *Modification of a Consent Decree.* Petitioners contend that the preliminary injunction in this case exceeded the district court's authority under Title VII because it prevented the layoff of black firefighters who may not have been victims of the City's discrimination. In their view, such race-conscious relief is not authorized by Title VII. But the preliminary injunction at issue here did not rest upon the district court's authority to redress violations of Title VII; it rested upon the court's inherent authority to modify an approved consent decree to effectuate its basic purpose in light of unanticipated circumstances. A court may properly exercise its inherent authority to modify a consent decree to effectuate the original purpose of the decree without making the specific factual determinations that would be necessary to support the same relief in a litigated case, and without stopping to inquire whether the defendant could have successfully opposed such relief had the case proceeded to trial. By entering into a consent decree, the parties forego the litigation that would lead to judicial identification of the victims of discrimination. Such a decree may properly be modified to avoid frustration of the relief granted therein without reopening the factual disputes composed by the decree and requiring the plaintiffs to prove their case on the merits.

The district court did not abuse its discretion in determining that the preliminary injunction was necessary to effectuate the consent decree's purpose in light of the unanticipated layoffs announced by the City. That court reasonably concluded that the decree's purpose is prompt and ongoing correction of the underrepresentation of blacks in the Fire Department caused by discriminatory

hiring and promotion practices. The district court also reasonably found that the City's proposed layoffs on the basis of seniority would frustrate the decree's purpose.

3. *Race-Conscious Relief under Title VII.* Petitioners' contention that Title VII does not authorize race-conscious relief is not only inapposite, it is incorrect. Neither § 703(h) nor § 703(j), relied upon by petitioners, speaks to or limits the judicial remedies available to correct violations of Title VII. Section 706(g), the remedial provision of the title, vests broad authority in the district courts to issue such relief as deemed "appropriate." As the courts of appeals have unanimously held, race-conscious relief is "appropriate" in the context of manifest and pervasive employment discrimination. Moreover, in amending § 706(g) in 1972, Congress endorsed the prevailing judicial view that the authority conferred by § 706(g) encompasses race-conscious remedies that may benefit persons who are not proven victims of discrimination.

ARGUMENT

I. THIS CASE IS MOOT BECAUSE THE PRELIMINARY INJUNCTION AT ISSUE HAS BEEN IRREVOCABLY CARRIED OUT AND THIS COURT'S REVIEW OF THAT EXPIRED INJUNCTION WOULD NOT AFFECT THE PARTIES' LEGAL RIGHTS

A. The Correctness of the District Court's Decision to Grant a Preliminary Injunction Is Moot

In May of 1981 the City of Memphis faced an unprecedented fiscal crisis and promulgated a layoff policy to reduce its expenditures.[2] On May 8, 1981, the district

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[2] The layoff policy provided that: (1) the Mayor has sole authority to determine which positions would be abolished; and (2) any person occupying an abolished position may bump a less senior person within his classification or the least senior employee

court issued a preliminary injunction restraining the City from implementing its layoff policy in a manner that would "decrease the percentage of black lieutenants, drivers, inspectors and privates that are presently employed in the Memphis Fire Department." Pet. App. A78. The City fully complied with the preliminary injunction in making the layoffs and demotions it deemed necessary. Over the next two years, natural attrition and retirements created vacancies in the Fire Department, and, with the aid of a tax increase, all laid off or demoted firefighters were restored to their former positions. Respondents' Suggestion of Mootness at 1; Petitioners' Joint Opposition to Respondents' Suggestion of Mootness ("Joint Opp.") at 1. Thus, the preliminary injunction of May 8, 1981, which is the only order under review, has been irrevocably carried out and no firefighter's job is now at stake.

In addition, the preliminary injunction has expired. That order simply required that the City "not apply the seniority policy proposed" to decrease the percentage of blacks occupying certain positions in the Fire Department as of May 8, 1981. Pet. App. A78. Thus, even if the City at some future time announces new layoffs in the Fire Department, its decision would not be governed in any way by the order of May 8, 1981.[3]

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in a lower classification, or may go on layoff. J.A. 83-89. Because the actual effect of the layoff policy on an individual's employment depended on numerous decisions by other employees as well as the City administration, the City was unable to advise the district court of the precise impact that the layoff policy would have on blacks. J.A. 70. An exhibit compiled by the Fire Department and introduced at the preliminary injunction hearing, however, indicated that the City's layoff policy would drastically reduce the number of black lieutenants and drivers. J.A. 69, 96-97.

[3] Petitioners suggest that the preliminary injunction could conceivably affect future layoffs. Joint Opp. at 4. This contention is belied by the specific terms of the district court's order, quoted in text, by its provisional status as a preliminary injunction, and by the fact-specific rationale for its issuance. "The language of an injunction must be read in the light of the circumstances surround-

Since the correctness of the preliminary injunction is the only issue before the Court, this case is moot. *University of Texas* v. *Camenisch*, 451 U.S. 390 (1981), establishes that "the correctness of the decision to grant a preliminary injunction" is moot when "the terms of the injunction * * * have been fully and irrevocably carried out." *Id.* at 394, 398. Numerous other cases confirm that full compliance with an injunction moots the question whether the injunction should have issued. *E.g.*, *Oil Workers Union* v. *Missouri*, 361 U.S. 363 (1960); *American Book Co.* v. *Kansas*, 193 U.S. 49 (1904); *Western Addition Community Organization* v. *Alioto*, 514 F.2d 542, 544 (9th Cir.) (per curiam), *cert. denied*, 423 U.S. 1014 (1975); *Campbell Soup Co.* v. *Martin*, 202 F.2d 398 (3d Cir. 1953). As the Court explained in *Oil Workers Union*:

> "The decision we are asked to review upheld only the validity of an injunction, an injunction that expired by its own terms * * *. Any judgment of ours at this late date 'would be wholly ineffectual for want of a subject matter on which it could operate. An affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other. To adjudicate a cause which no longer exists is a proceeding which this Court uniformly has declined to entertain.'"

Oil Workers Union v. *Missouri*, *supra*, 361 U.S. at 371, *quoting Brownlow* v. *Schwartz*, 261 U.S. 216, 217-18 (1922).

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ing its entry: the relief sought by the moving party, the evidence produced at the hearing on the injunction, and the mischief that the injunction seeks to prevent." *United States* v. *Christie Indus., Inc.*, 465 F.2d 1002, 1007 (3d Cir. 1972). *Accord*, *Haskell* v. *Kansas Natural Gas Co.*, 224 U.S. 217, 223 (1912). These factors all indicate that the preliminary injunction was directed only to the layoffs announced in May 1981. See also Fed.R.Civ.P. 65(d) (injunction must "be specific in terms").

B. The Expired Preliminary Injunction Is Not Saved From Mootness By the Fact that Laid-off Employees Did Not Accrue Seniority Credit During the Layoff Period

Petitioners maintain that the correctness of the district court's decision to issue a preliminary injunction is saved from mootness because the laid-off firefighters did not accrue seniority credit during the layoff period, and this loss adversely affects an employee's opportunities for future promotions and job transfers and an employee's security from future layoffs. Joint Opp. at 6-7. This argument fails for several reasons.

In the first place, the petitioners do not suggest that any formerly laid-off firefighter has filed a claim for seniority credit or, to raise a related issue, backpay, for the layoff period. *Amicus* is aware of no such claim. Thus, the "controversy" over seniority credit is hypothetical.[4]

Second, even if such controversies did exist, the decisions of this Court recognize that a case pending here is not kept alive because related issues are pending between the same parties in another forum. For example, in *Oil Workers Union* v. *Missouri*, *supra*, the Court declined to review an expired anti-strike injunction issued pursuant to an allegedly unconstitutional state statute, even though the challenged statute also governed a monetary penalty claim pending in state court against the union.

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[4] It is not surprising that no firefighter has brought suit claiming that he was laid off in violation of the Memorandum of Understanding, an agreement between the Union and the City providing that any layoffs shall be made on the basis of seniority. Pet. App. A81. The Supreme Court of Tennessee has recently confirmed that the Memorandum of Understanding confers no enforceable rights. *Futenwilder* v. *Firefighters Ass'n Local Union 1784*, 649 S.W.2d 268, 270 (Tenn. 1982). The Memorandum of Understanding is merely a reflection of the right of public employees to "meet and confer" with their employer; any binding agreement would violate the principle of Tennessee law that "[p]ublic employers cannot abdicate or bargain away their continuing legislative discretion. * * *" Opinion of Tennessee Attorney General No. 79-172 (April 10, 1979).

"[T]hat suit is not before us. We have not now jurisdiction of it or its issues. Our power only extends over and is limited by the conditions of the case now before us." 361 U.S. at 370, *quoting American Book Co.* v. *Kansas*, 193 U.S. 49, 52 (1904). *Accord, Murphy* v. *Hunt*, 455 U.S. 478, 481 & n.5 (1982) (per curiam); *University of Texas* v. *Camenisch, supra*, 451 U.S. at 394.

Third, this Court's affirmance or reversal of the district court's expired preliminary injunction would have no effect on any claims by previously laid-off firefighters for restoration of lost seniority or backpay. The district court did not order the layoff of any firefighters. Nor did the district court address the issues of seniority credit or backpay for firefighters the City might choose to lay off. Judge McRae stated that "I don't know what the policy will be with regard to that memorandum of understanding that the City signed with the Fire Fighters Union." Pet. App. A76. Thus, the district court's order by its terms and intent does not bar any claims by laid-off firefighters for restoration of seniority or backpay. Under these circumstances, the expired preliminary injunction would not constitute a defense for the City to claims by laid-off firefighters. This much is made clear by this Court's recent decision in *W.R. Grace & Co.* v. *Local Union 759*, 51 U.S.L.W. 4643 (U.S. May 31, 1983), which held that a district court injunction requiring an employer to conduct any layoffs pursuant to the terms of a Title VII conciliation agreement, instead of pursuant to the seniority provisions of the collective bargaining agreement, does not constitute a defense to a damages claim by an employee laid off in violation of the collective bargaining agreement.[5]

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[5] To carry out the speculation regarding unasserted causes of action to its logical conclusion, we note that the City has no potential cause of action that could be affected by this Court's review of the district court's expired preliminary injunction. Even if formerly laid-off white firefighters seek backpay or seniority credit from the City and even if they prevail on those claims, the City would have no claim for reimbursement against respondents for securing an allegedly erroneous injunction. No bond was posted for

The recent case of *Boston Firefighters Union* v. *Boston Chapter, NAACP*, 51 U.S.L.W. 4566 (U.S. May 16, 1983) (per curiam) provides an instructive contrast to the case at bar. That case involved a *permanent* injunction enjoining seniority-based layoffs that would decrease the percentage of minority officers in the Boston Fire and Police Departments below specified levels. Like the instant case, the laid-off employees were reinstated to their former positions. Unlike the present case, the laid-off officers were pursuing administrative appeals seeking restoration of lost seniority and backpay. Also unlike the present case, in the Boston case the district court's injunction could have been interpreted as enjoining the administrative agency considering those claims from granting backpay or restoring lost seniority. *Castro* v. *Beecher*, 522 F. Supp. 873, 878 (D. Mass. 1981). Nevertheless, this Court remanded for consideration of mootness, 51 U.S.L.W. 4566, and the First Circuit dismissed the appeal as moot. *Boston Chapter, NAACP* v. *Beecher*, No. 81-1642, slip op. (1st Cir. Aug. 31, 1983). The present case is much more clearly moot.[6]

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the preliminary injunction, and "[a] party injured by the issuance of an injunction later determined to be erroneous has no action for damages in the absence of a bond." *W.R. Grace & Co.* v. *Local Union 759, supra*, 51 U.S.L.W. at 4646 n.14.

[6] In the *Boston Firefighters* case, the laid-off policemen and firefighters were reinstated pursuant to a newly enacted state statute. As this Court explained, that statute "provid[ed] the City of Boston with new revenues, require[d] reinstatement of all police and firefighters laid off during the reductions in force, secur[ed] these personnel against future layoffs for fiscal reasons, and requir[ed] the maintenance of minimum staffing levels in the police and fire departments through June 30, 1983." 51 U.S.L.W. 4566. In the instant case, the City was able to reinstate all laid-off or demoted firefighters prior to expiration of their recall rights due to a tax increase and attrition within the Fire Department.

Unlike petitioners (Joint Opp. at 2-6), we perceive no feature in the Massachusetts statute that supports mootness in that case but not this one. Certainly the minimum staffing requirement provided no significant protection against recurrence of the controversy—that requirement expired six weeks after this Court's remand for

C. The Expired Preliminary Injunction Is Not Justiciable As An Order "Capable of Repetition, Yet Evading Review"

Ordinarily a case is moot if the parties lack a legally cognizable interest in its outcome, but the decisions of this Court recognize an exception to this rule for cases that are "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). This exception is limited to cases satisfying two requirements: (1) there is a "reasonable expectation" or a "demonstrated probability" that the same complaining party will again be subjected to the challenged action; and (2) the challenged action is by its nature too short to be fully litigated prior to its cessation or expiration. *Murphy* v. *Hunt*, *supra*, 455 U.S. at 482; *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 187 (1979); *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam). Contrary to petitioners' suggestion, Joint Opp. at 6, neither of the exception's requirements is met in this case.[7]

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consideration of mootness. Moreover, while the statute protected specific individuals from future layoffs, it did not prevent the Boston Police and Fire Departments from laying off other individuals; and in making such layoffs, the Departments were permanently enjoined from reducing the percentage of minority officers below specified levels.

[7] Petitioners and the United States also assert that this case is not moot unless respondents satisfy the "heavy burden" of establishing (1) that there is no reasonable expectation that the enjoined conduct will recur and (2) that interim relief or events have completely eradicated the effects of the alleged violation. Joint Opp. at 3-5; Brief for United States as *Amicus Curiae* at 7-8 n.11. As support for this argument, they cite *United States* v. *W.T. Grant Co.*, 345 U.S. 629 (1953), and *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979). Those cases stand for the proposition that a court should be reluctant to conclude that a case is moot where the defendant has voluntarily ceased the allegedly illegal conduct, possibly in order to defeat judicial review. Those cases and the test they apply in order to determine whether the plaintiffs continue to have a need for judicial relief are quite inapposite here. The plaintiffs, respondents here, have irrevocably received all the relief they

1. There is no "reasonable expectation" or "demonstrated probability" that the petitioners will again be subjected to the challenged injunctive relief. The layoffs of municipal employees announced by the City in May 1981 were the first such layoffs in the history of Memphis. Pet. App. A73; Pet. App. A8. This fact alone casts doubt on any claim that there is a "reasonable expectation" or "demonstrated probability" of future layoffs. See *Illinois State Board of Elections* v. *Socialist Workers Party*, *supra*, 440 U.S. at 187-88.

Even if Memphis does lay off City employees in the future, few if any Fire Department personnel are apt to be affected. The Mayor testified that the Fire Department was selected for reduction in 1981 because of a then-recent study showing that Memphis was devoting a much higher percentage of its total budget to fire protection than other cities of comparable size. J.A. 36-37. Now that the City has brought the Fire Department's budget into line, it is unlikely to target its workforce for reduction in the future.

Most important, even if firefighters are laid off in the future, the petitioners are unlikely to be subjected to injunctive relief such as that challenged here. While seniority-based layoffs would have had a significantly disproportionate effect on black firefighters in May 1981, the disproportionate impact of a seniority-based layoff policy will dissipate as existing black firefighters gain more seniority and other black firefighters are hired or promoted pursuant to the consent decree. Thus, given the passage of time and even modest progress toward attainment of the goals of the consent decree, "such extraordinary relief as that contained in the Order here appealed * * * will, in all probability, be unnecessary." *Western*

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requested and they garnered that relief not through the defendants' "voluntary cessation" but by court order. See *DeFunis* v. *Odegaard*, 416 U.S. 312, 318 (1974) (per curiam).

Addition Community Organization v. *Alioto*, 514 F.2d 542, 544 (9th Cir.) (per curiam), *cert. denied*, 423 U.S. 1014 (1975) (a case also involving temporary race-conscious relief against a fire department).

2. The "capable of repetition, yet evading review" doctrine is limited to controversies that, by their very nature, are unlikely to remain alive long enough to be definitively settled by the courts. *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 563 (1980) (opinion of Burger, C.J.); *Kremens* v. *Bartley*, 431 U.S. 119, 133 (1977); *DeFunis* v. *Odegaard*, *supra*, 416 U.S. at 319; *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 126 (1974). The preliminary injunction at issue here is not such an inherently transitory order that it would typically evade full appellate review.

It was purely fortuitous that all previously laid-off employees were restored to their former positions prior to this Court's review of the controversy. The petitions for certiorari were filed on August 4, 1982; the last demoted or laid-off firefighter was restored to his position in June 1983. Only because this Court withheld ruling on the petitions pending disposition of *Boston Firefighters Union*, *supra*, did this controversy become moot prior to a decision on the merits by this Court. It was also fortuitous that attrition and retirement within the Fire Department permitted recall of all the laid-off employees prior to expiration of their 2-year recall rights (J.A. 88-89), thus mooting the issue of the correctness of the injunction. The instant case is moot because of these specific circumstances, not because the controversy is inherently evasive of review.

II. THE PRELIMINARY INJUNCTION WAS AN APPROPRIATE EXERCISE OF THE DISTRICT COURT'S INHERENT AUTHORITY TO MODIFY A CONSENT DECREE TO EFFECTUATE ITS PURPOSE IN LIGHT OF CHANGED CIRCUMSTANCES

A. The Preliminary Injunction Does Not Rest Upon the District Court's Remedial Authority Under Title VII But Rather Upon Its Inherent Authority to Modify the Original Consent Decree so as to Effectuate Its Basic Purpose

Petitioners and their supporting *amici* argue at length that the preliminary injunction, by awarding race-conscious relief to black firefighters who had not established that they were individual victims of discrimination, exceeded the district court's remedial authority under Title VII, specifically §§ 703(h), 703(j), and 706(g). Their arguments rest on an untenable premise—that if authority for issuance of the preliminary injunction exists, it necessarily derives from Title VII.

1. This Court has frequently recognized the "inherent" "power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent." *United States* v. *Swift & Co.*, 286 U.S. 106, 114 (1932). See also *Arizona* v. *California*, 51 U.S.L.W. 4325, 4330 (U.S. Mar. 30, 1983); *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 437 (1976); *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244, 251 (1968); *Chrysler Corp.* v. *United States*, 316 U.S. 556, 562 (1942). "The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief." *System Federation No. 91* v. *Wright*, 364 U.S. 642, 647 (1961). In this case, authority to modify the consent decree was also reserved by its terms. Paragraph 17 of the decree provides: "The Court retains jurisdiction of this action for such further orders as may be

necessary or appropriate to effectuate the purposes of this decree." Pet. App. A69.

Respondents' application for a preliminary injunction was not based on any allegation that the City's proposed layoffs violated Title VII. It was an appeal to the district court's discretion to effectuate the consent decree. J.A. 20-22. And the district court proceeded on that understanding. For example, the court opened the preliminary injunction hearing with the observation that the issue for its determination was whether the City's proposed layoffs amounted to changed circumstances that would perpetuate discrimination which the consent decree was intended to avoid. J.A. 30. Thus, petitioners' arguments regarding the scope of judicial authority to remedy violations of Title VII misconceive the basis for the district court's ruling.

2. Petitioners and the United States deny the existence of the district court's inherent and expressly retained authority to modify the consent decree to effectuate its purpose. They maintain that the district court's authority to modify the consent decree derives solely from the statute that the decree is intended to enforce, Title VII. In their view, the district court's remedial authority to issue the preliminary injunction "is the same as if the case had gone to a final, litigated judgment" under Title VII. United States Br. at 12 & n.13. See Union Br. at 20; City Br. at 23. That contention is unsupportable.

In its simple form, petitioners' Title VII argument is this: the preliminary injunction violates Title VII because it grants relief against an employer who has not been adjudged to have violated Title VII. Union Br. at 26; City Br. at 22-23. This contention is wholly without merit. It goes without saying that Title VII does not authorize a court to order relief against an employer who has not violated Title VII. But the basis for the preliminary injunction was not a new violation of Title VII; that injunction was designed to effectuate the basic pur-

pose of the consent decree in light of changed circumstances. See *Chrysler Corp.* v. *United States*, *supra*, 316 U.S. at 562; *cf. Wright* v. *Council of the City of Emporia*, 407 U.S 451, 459 (1972). This version of petitioners' argument rests on the notion that a consent decree settling a Title VII case can grant no relief to the plaintiff unless it contains an admission of liability by the defendant. Few if any Title VII cases would be settled if that were the law.

In an alternative formulation, petitioners' Title VII argument is that §§ 703(h), 703(j), and 706(g) preclude a federal court from awarding race-conscious relief against an employer who *has* violated Title VII. In their view, the only affirmative relief authorized by Title VII is "rightful place" remediation for proven victims of the employer's discrimination; such identified victims may be awarded the backpay and seniority that would have been theirs but for the employer's unlawful discrimination. In Part III we show that this is an erroneously restrictive view of judicial authority to remedy violations of Title VII. But whatever the merit of petitioners' argument in a litigated Title VII case, it should not be accepted as a limitation on the federal court's inherent authority to approve a consent decree or to modify such a decree to achieve its basic purpose.[8]

[8] Contrary to the majority opinion of the court of appeals (679 F.2d at 551-56; Pet. App. A12-A23), the validity of the 1980 consent decree was not put in issue by respondents' request for a preliminary injunction effectuating that decree. A request for modification of a consent decree, whether by the defendant on the ground that continued operation of the decree is inequitable, or by the plaintiff on the ground that modification is necessary to effectuate the decree's basic purpose, provides no warrant for impeaching the original decree's validity. *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932). See *Arizona* v. *California*, 51 U.S.L.W. 4325, 4330 (U.S. Mar. 30, 1983); *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 432 (1976); *Chrysler Corp.* v. *United States*, 316 U.S. 556, 562 (1942); *EEOC* v. *Safeway Stores, Inc.*, 611 F.2d 795, 799-80 (10th Cir. 1979). Thus, the validity of the relief contained in the consent decree, such as hiring and promotion ratios, is not at issue here.

This Court's decisions establish that a federal court may approve a consent decree or modify a consent decree to effectuate its basic purpose without making the specific factual determinations that would be necessary to support the same relief in a litigated case, and without stopping to inquire whether the defendant could have successfully opposed such relief at trial. *Swift & Co.* v. *United States*, 276 U.S. 311, 325-27, 329-30 (1928); *United States* v. *Swift & Co.*, 286 U.S. 106, 116-117 (1932); *Chrysler Corp.* v. *United States*, *supra*; *Pacific R.R.* v. *Ketchum*, 101 U.S. 289, 297 (1880). See also *Walling* v. *Miller*, 138 F.2d 629 (8th Cir. 1943), *cert. denied*, 321 U.S. 784 (1944).[9] These principles have frequently been applied in employment discrimination cases. *E.g.*, *Moore* v. *City of San Jose*, 615 F.2d 1265, 1271-72 (9th Cir. 1980); *EEOC* v. *Safeway Stores, Inc.*, 611 F.2d 795, 799 (10th Cir. 1979), *cert. denied*, 446 U.S. 952 (1980); *Airline Stewards & Stewardesses Ass'n, Local 550* v. *American Airlines, Inc.*, 573 F.2d 960, 963-64 (7th Cir.), *cert. denied*, 439 U.S. 876 (1978); *Carson* v. *American Brands, Inc.*, 654 F.2d 300 (4th Cir. 1981) (en banc), *adopting* 606 F.2d 420, 425, 431 (Winter, J.,

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[9] There are of course limitations on a federal court's inherent authority to modify a consent decree to effectuate its purpose. Essentially, these limitations are the same as those that exist on the court's authority to approve a consent decree; if the court could not have lawfully approved the consent decree had it contained the proposed modification, the court should not grant the modification. There are three such limitations. The court must have subject matter jurisdiction over the case. *Pacific R.R.* v. *Ketchum*, *supra*, 101 U.S. at 297. The parties cannot by consent deprive third parties of their substantive rights. *Society Hill Civic Ass'n* v. *Harris*, 632 F.2d 1045, 1059 (3d Cir. 1980). And there must be no applicable statutory restriction on the federal courts' inherent authority to approve or modify a consent decree. The district court's preliminary injunction exceeds none of these limitations. It had subject matter jurisdiction over the lawsuit. As discussed below, its order does not deprive third parties of any substantive rights. See p. 18. And the provisions of Title VII relied upon by petitioners do not restrict inherent judicial authority to approve or modify a consent decree. See pp. 19-20.

dissenting). Indeed, the principles apply with special force to Title VII cases, for in enacting that title "Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims." *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *see Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

Thus, the City should not be heard to say that respondents are not victims of discrimination. The original Stotts class action was brought on behalf of victims of the City's allegedly discriminatory hiring and promotional practices. J.A. 9-10. Had the case been tried, respondents might have established their entitlement to backpay, constructive seniority and promotion. But the case was settled and the City relinquished its right to litigate the issue of discrimination in exchange for avoiding the consequences of a judicial finding of discrimination and judicial identification of the victims of that discrimination. In short, petitioners' argument that the preliminary injunction exceeded the district court's remedial authority under Title VII rests on the notion that the factual disputes composed by the consent decree must now be resolved in their favor.[10]

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[10] Nothing in *System Federation No. 91* v. *Wright*, *supra*, relied upon by petitioners, conflicts with the principle that a federal court has inherent authority to modify a consent decree to fulfill its purpose. That case involved a union that, at a time when the Railway Labor Act prohibited union shop agreements, acceded to a consent decree that prohibited it from entering into union shop contracts. The Railway Labor Act was subsequently amended to permit union shop agreements and the union moved for prospective modification of the decree to permit it to negotiate for such an agreement. This Court held that the requested modification should be granted. The Court reasoned that the union's consent should be "read as directed toward events as they then were" and that continuation of the prohibition would be inequitable and inconsistent with the objectives of the amended Railway Labor Act. 364 U.S. at 647, 651-53. Nothing in the Court's opinion even faintly suggests that a consent decree may not be modified to effectuate its basic purpose unless the court could award such relief in a case litigated to judgment on the same incomplete factual record.

3. *Amicus curiae* AFL-CIO makes a slightly different argument. Brief for AFL-CIO as *Amicus Curiae* in Support of Petitioners at 2-3. The AFL-CIO assumes *arguendo* that a defendant may be able to consent to injunctive relief against it that could not have been forced upon the defendant in a judgment on the merits, and that such a decree may be modified to achieve its purpose. But AFL-CIO insists that a defendant's consent surely does not increase the court's authority to grant relief that inflicts injury on non-consenting parties. *Id.* at 3.

The AFL-CIO's interesting argument is beside the point because the district court's preliminary injunction did not inflict injury on third parties. That order simply required the City not to take action that would have vitiated the progress attained under the consent decree; it certainly did not require the City to lay off white firefighters.[11] Indeed, Judge McRae declined to express a view on whether the City would be violating the contractual rights of white firefighters if the City chose to go forward with the layoffs in the Fire Department. Pet. App. A76, A78. Under these circumstances, this Court's decision in *W.R. Grace & Co.* v. *Local Union 759*, 51 U.S.L.W. 4643 (U.S. May 31, 1983), provides the correct analysis of the situation. When an employer lays off white employees instead of black employees who are protected by a consent decree, the employer is shifting the burdens it has assumed to redress prior discrimination to its white employees. If such a reallocation abridges the rights of the white employees, they should look to the employer for relief.[12]

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[11] The City was free to forego any layoffs in the Fire Department and to reduce expenditures to the extent deemed necessary in other ways. For example, the City might have reduced the work week and salaries of all firefighters.

[12] Concurring Judge Martin made this point. 679 F.2d at 568-69; Pet. App. A47-50. The majority opinion of Judge Bailey Brown in *Brown* v. *Neeb*, 644 F.2d 551, 564-66 (6th Cir. 1981), a case quite similar to the instant one, also rests on this basis.

4. If Congress expresses an intention to restrict the federal court's inherent authority to modify a consent decree to effectuate its basic purpose, that intention must no doubt be respected. But there is not a hint of such an intention in the provisions of Title VII relied upon by petitioners.

Section 703(j) provides that nothing in Title VII shall be interpreted to "require" an employer to grant preferential treatment to any racial group "on account of" a racial imbalance in the employer's workforce. See *Steelworkers* v. *Weber*, 443 U.S. 193, 205-07 (1979); *Teamsters* v. *United States*, 431 U.S. 324, 374 n.61 (1977). This provision does not purport to limit a court's remedial authority to redress a violation of any substantive provision of Title VII. *Ass'n Against Discrimination in Employment, Inc.* v. *Bridgeport*, 647 F.2d 256, 280-81 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982). *A fortiori*, the section cannot be read as limiting a court's inherent authority to modify a consent decree composing a dispute arising under Title VII.

Section 703(h) provides that it is not a violation of Title VII for an employer to apply a bona fide seniority system. See *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 761 (1976). Like § 703(j), this provision does not limit remedial authority to redress violations of Title VII. As this Court has recognized, "[t]here is no indication in the legislative materials that § 703(h) was intended to modify or restrict relief otherwise appropriate once an illegal discriminatory practice" is found. *Id.* at 761-62. *A fortiori*, the provision is not a limitation on a court's inherent authority to modify a consent decree.

Section 706(g) is the remedial provision of Title VII. It sets forth the judicial remedies available to a plaintiff who has established the defendant's liability under § 703. The first sentence of § 706(g) provides for judicial remedies "[i]f the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the com-

plaint. * * *" 42 U.S.C. § 2000e-5(g). The last sentence of § 706(g)—the provision upon which petitioners rely—must be read in context as a limitation on the authority granted by the first sentence. It provides that "[n]o order of the court shall require" the hiring, reinstatement or promotion of an individual, or the payment to him of any back pay, "if such individual * * * was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin. * * *" This provision addresses the case where the plaintiff has established a violation of Title VII, but the employer can nevertheless defeat judicial relief for that individual by showing that the plaintiff would not have received the job, promotion or reinstatement even in the absence of discrimination—that is, that a lawful reason justified the adverse employment decision. *Day* v. *Mathews*, 530 F.2d 1083, 1085 & n.2 (D.C. Cir. 1976); *Patterson* v. *Greenwood School Dist. 50*, 696 F.2d 293, 295 (4th Cir. 1982); *King* v. *Laborers Int'l Union, Local No. 818*, 443 F.2d 273, 278-79 (6th Cir. 1971). See Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 Colum. L. Rev. 292 (1982). Thus, the last sentence of § 706(g) is expressly limited to cases where the court finds that the individual suffered the adverse employment decision for a reason other than discrimination. Such a finding, as well as the initial determination that the employer had violated Title VII, would be made only in a Title VII case litigated to judgment. The provision accordingly has no application to the court's authority to approve a consent decree settling a case, or to the court's authority to modify a consent decree to effectuate its purpose.

B. The District Court Did Not Abuse Its Discretion In Issuing the Preliminary Injunction

Having put aside petitioners' inapposite Title VII arguments, it remains to determine whether the district court's preliminary injunction was an appropriate exer-

cise of the district court's inherent authority to modify the consent decree.

1. The test for ruling on a plaintiff's request for modification of a consent decree is "whether the change serve[s] to effectuate * * * the basic purpose of the original consent decree." *Chrysler Corp.* v. *United States*, 316 U.S. 556, 562 (1942). If unanticipated circumstances threaten to prevent the decree from achieving its purpose, the decree should be modified to avoid that frustration of purpose. *Id.*; *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244, 248-49 (1968); *Columbia Artists Management, Inc.* v. *United States*, 381 U.S. 348 (1965) (per curiam); *Liquid Carbonic Corp.* v. *United States*, 350 U.S. 869 (1955), *rev'g* 123 F. Supp. 653 (E.D.N.Y. 1954); *United States* v. *International Harvester Co.*, 274 U.S. 693, 702-04 (1927).[13]

Notwithstanding these authorities, petitioners argue that a consent decree can be judicially modified only upon a "clear showing of grievous wrong evoked by new and unforeseen conditions." Union Br. at 18 and City Br. at 18-19, both *quoting United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932). But as this Court made clear in *United Shoe Machinery Corp.*, *supra*, the "grievous wrong" language of *Swift* must be read in the context of *Swift*'s holding that a decree "may *not* be changed in the interest of the defendants if the purposes of the liti-

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[13] The lower courts apply the test for modification stated in the text. *E.g.*, *Ass'n Against Discrimination* v. *Bridgeport*, 710 F.2d 69, 74 (2d Cir. 1983); *Brown* v. *Neeb*, 644 F.2d 551, 565 (6th Cir. 1981); *Exxon Corp.* v. *Texas Motor Exchange*, 628 F.2d 500, 503 (5th Cir. 1980); *Evans* v. *Buchanan*, 512 F. Supp. 839, 849 (D.Del. 1981). The commentators also recognize it. *E.g.*, 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2961, p. 604 (1973) (*United Shoe* indicates that "modification is proper if the original purposes of the injunction are not being fulfilled in any material respect"); A. Larson, *Employment Discrimination* § 54.41, p. 11-84.32 (1983) ("If the consent decree is not achieving its purpose, as indicated by events subsequent to entry of the decree, the plaintiff may obtain a modification upon showing the failure of the agreed remedy").

gation as incorporated in the decree * * * have not been fully achieved." 391 U.S. at 248. The "grievous wrong" test is not applicable in the obverse situation, where the plaintiff seeks modification of a decree to effectuate its purpose. *Id.* at 249-52.[14]

2. This Court has recognized that "there must be wide discretion in the District Court" to assess whether changed circumstances justify modification of a consent decree. *System Federation No. 91* v. *Wright*, *supra*, 364 U.S. at 648. Such broad discretion is particularly appropriate where, as here, a district court does not render a permanent, facial modification to a decree but rather grants temporary injunctive relief to prevent frustration of a decree's purpose. See 679 F.2d at 678; Pet. App. A46-47 (Martin, J., concurring); *Brown* v. *Neeb*, *supra*, 644 F.2d at 565. See generally *Brown* v. *Chote*, 411 U.S. 452, 457 (1973); *Alabama* v. *United States*, 279 U.S. 229, 231 (1929).

The task before the district court was to determine whether the City's proposed layoffs would frustrate the purpose of the consent decree. Since a consent decree represents a compromise, its purposes are those "embodied in the instrument rather than the maximum aspirations—which are bound to be inconsistent anyway —of the interested parties." *White* v. *Roughton*, 689

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[14] Contrary to petitioners' contention, the district court's preliminary injunction is not inconsistent with the rule of *United States* v. *Armour & Co.*, 402 U.S. 673 (1971), *United States* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959), and *Hughes* v. *United States*, 342 U.S. 353 (1952). Those cases hold that a court should not give a consent decree an *interpretation* that its language cannot sustain even if that interpretation would further the purposes of one of the parties to the decree. The Court in each of those cases reasoned that while "modification could be had after a proper hearing proving the need for such modification under applicable standards, it would not sanction such modification in the guise of construing a consent decree." *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 236 n.9 (1975). The district court's preliminary injunction was a modification of a consent decree, not an interpretation, and it was issued following an appropriate hearing.

F.2d 118, 119-20 (7th Cir. 1982), *cert. denied*, 103 S.Ct. 1524 (1983). *Accord, United States* v. *Armour & Co.*, 402 U.S. 673, 681-82 (1971).

The decree at issue here provides that its purpose is "to insure that any disadvantage to minorities that may have resulted from past hiring and promotional practices be remedied so that equal employment opportunity will be provided to all." Pet. App. A59-A60. In the same vein, the decree states that "[t]he purpose of this decree is to remedy the past hiring and promotion practices of the Memphis Fire Department. * * *" Pet. App. A64-65.

Toward these ends, the decree establishes as a long term goal the raising of "black representation [in] each job classification in the fire department to levels approximating the black proportion of the civilian labor force in Shelby County." Pet. App. A64. Moreover, "[t]o insure as quickly as practicable the attainment of [this] long range goal," the decree establishes interim race-conscious hiring and promotion ratios to be met on an annual basis. Pet. App. A64-65. The decree is silent on layoffs, as the parties did not anticipate this possibility. Pet. App. A73.

The stated purposes and remedial provisions of the decree fully support the district court's conclusion that the decree's purpose is "hiring and promotion" to overcome the present and continuing effects of racial discrimination in the Fire Department. Pet. App. A74. This purpose is to be achieved by adherence to concrete goals and ratios that assure prompt and ongoing correction of a condition—the extreme underrepresentation of blacks—caused by the Department's former policy of racial exclusivity. In sum, as the District Judge who entered the decree recognized, it reflects a firm commitment to continuous, incremental progress in eliminating the condition of gross discriminatory underrepresentation of blacks at all levels of the Fire Department.[15]

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[15] Though well-supported, this conclusion was necessarily preliminary since the preliminary injunction hearing was not consoli-

Judge McRae also reasonably concluded, on the basis of the limited record developed at the preliminary injunction hearing, that the City's proposed layoffs would vitiate that commitment. Pet. App. A74-75. He found that application of a seniority-based layoff policy in the Fire Department so soon after the City had made modest strides in promoting and hiring blacks within the Fire Department would frustrate the consent decree's purpose. Pet. App. A73-75. That determination, grounded on findings that are well supported and certainly not clearly erroneous, was well within Judge McRae's discretion. Moreover, as the Court of Appeals recognized, the preliminary injunction is also supported by the need to prevent irreparable harm to minority firefighters and by the public interest in preserving the progress made in redressing and eliminating discrimination within the Memphis Fire Department. 679 F.2d at 560; Pet. App. A31.

III. THE FEDERAL COURTS ARE AUTHORIZED TO GRANT RACE-CONSCIOUS AFFIRMATIVE RELIEF UNDER TITLE VII

We have shown that petitioners' contention that the preliminary injunction exceeds the limits of remedial authority under Title VII is inapposite because that order rests on the district court's inherent authority to modify a consent decree. We now show that petitioners are wrong in contending that the remedial provision of Title VII, § 706(g), does not authorize race-conscious relief.[16]

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dated with trial on the merits, as provided for in Fed.R.Civ.P. 65(a)(1). Petitioners could have chosen to challenge this conclusion before the district court and could have presented evidence to support a contrary view of the decree's purpose. See *United States* v. *ITT Continental Baking Co.*, *supra*, 420 U.S. at 238. They opted not to do so, and instead appealed the preliminary injunction.

[16] Petitioners also rely on § 703(h) and § 703(j), but neither of those provisions speaks to, much less limits, the judicial remedies available to correct violations of Title VII. See p. 19, *supra*.

The first sentence of § 706(g) confers broad authority on the federal courts to remedy unlawful employment practices:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, *but is not limited to*, reinstatement or hiring of employees, with or without back pay * * *, *or any other equitable relief as the court deems appropriate.*" 42 U.S.C. § 2000e-5(g) (emphases supplied).

Thus, § 706(g) authorizes such relief as deemed "appropriate." Of course, judicial remedial discretion must be exercised in conformity with the purposes of Title VII. *Teamsters* v. *United States*, 431 U.S. 324, 364 (1977); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 415-18 (1975). But where an employer has systematically discriminated against blacks in hiring and promotions, race-conscious relief well serves Title VII's primary purpose: "to achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees." *Teamsters* v. *United States*, *supra*, 431 U.S. at 364. In such a case, race-conscious relief may be essential "to eliminate, so far as possible, the last vestiges" of the employer's discriminatory practices. *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 417.

In the present case, the current effects of discrimination—the gross underrepresentation of blacks in the Fire Department—could not be cured by offering established victims of discrimination their "rightful place" in the Department. Even if such victims could be identified, many will have gone on to other employment and be uninterested in joining the Fire Department. Moreover, when a governmental agency systematically excludes a racial minority from employment in all or some of its

public jobs, the victims of that discrimination are not limited to identifiable members of the minority group who actually applied for or were demonstrably deterred from applying for the off-limits jobs. Here, the City of Memphis had maintained a uniracial firefighting force. For this reason, most black Memphians would not even have considered firefighting as a possible occupation for them. Thus, petitioners' proposed dichotomy between victims and non-victims is illusory where the employer's pervasive racial discrimination is manifest. That dichotomy, if adopted, would prevent effective redress of manifest discrimination and would lock in the effects of such discrimination. For these reasons, the courts of appeals are unanimous in recognizing that affirmative race-conscious relief such as hiring and promotion goals is "appropriate" within the meaning of § 706(g).[17] The dis-

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[17] *E.g.*, *Thompson* v. *Sawyer*, 678 F.2d 257, 294 (D.C. Cir. 1982); *Boston Chapter, NAACP* v. *Beecher*, 504 F.2d 1017, 1027-28 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *Rios* v. *Enterprise Ass'n Steamfitters Local 638*, 501 F.2d 622, 629 (2d Cir. 1974); *EEOC* v. *A.T.&T. Co.*, 556 F.2d 167, 174-77 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); *Chisholm* v. *United States Postal Service*, 635 F.2d 482, 499 (4th Cir. 1981); *United States* v. *City of Alexandria*, 614 F.2d 1358, 1363-66 (5th Cir. 1980); *Local 53, Int'l Ass'n of Heat & Frost Insulators & Asbestos Wks.* v. *Vogler*, 407 F.2d 1047, 1055 (5th Cir. 1969); *United States* v. *I.B.E.W., Local No. 38*, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); *United States* v. *City of Chicago*, 663 F.2d 1354 (7th Cir. 1981) (en banc); *Firefighters Inst.* v. *City of St. Louis*, 616 F.2d 350, 364 (8th Cir. 1980), *cert. denied*, 452 U.S. 938 (1981); *United States* v. *Ironworkers Local 86*, 443 F.2d 544, 553-54 (9th Cir.) *cert. denied*, 404 U.S. 984 (1971); *United States* v. *Lee Way Motor Freight, Inc.*, 625 F.2d 918, 944 (10th Cir. 1979).

Contrary to the view of the *amicus* United States, this Court's decisions in *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747 (1976), and *Teamsters* v. *United States*, 431 U.S. 324 (1977), are fully consistent with the unanimous view of the circuits that race-conscious relief is authorized by Title VII. *Franks* and *Teamsters* involved the showing that a member of the plaintiff class must make to obtain individual "rightful place" relief such as retroactive seniority. They intimate no view on race-conscious relief.

trict court's preliminary injunction—which simply prohibited the City from conducting layoffs that would vitiate the City's hiring and promotional commitments and did not require the layoff of white firefighters—is likewise appropriate.

Contrary to petitioners' contention, the last sentence of § 706(g) does not withdraw the broad authority to grant race-conscious relief conferred by the first sentence. Unlike the first sentence's broad authorization of "any" appropriate relief against a respondent found to have violated Title VII, the last sentence's limitation on judicial orders applies only to individual relief: "No order of the court shall require the * * * hiring, reinstatement, or promotion of an *individual* as an employee, if such individual was * * * refused employment or advancement or was suspended or discharged for any reason other than discrimination" in violation of Title VII. By its terms, this provision merely precludes a court from ordering that a specific individual be hired, promoted or reinstated if the employer has refused to hire or promote that individual, or has discharged him, for nondiscriminatory reasons. See cases cited p. 20, *supra*. Race-conscious remedies such as those embodied in the original consent decree and the preliminary injunction effectuating that decree, do not award individual relief. They establish ratios and targets for overcoming discrimination. Nothing in the preliminary injunction or the consent decree precludes the Fire Department from laying off, or declining to promote, any specific black firefighter. Thus, those orders are fully consistent with § 706(g). See *EEOC* v. *A.T.&T. Co.*, 556 F.2d 67, 174-77 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).[18]

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[18] The last sentence of § 706(g), with its exclusive focus on individual relief, may be usefully contrasted with § 703(j), which provides that Title VII does not "require" an employer "to grant preferential treatment to any individual or to any *group*" solely because the employer's workforce is not racially balanced. This

The legislative history of Title VII of the Civil Rights Act of 1964 confirms that the last sentence of § 706(g) was intended merely to make clear that an individual who was denied employment opportunities for reasons other than discrimination does not have a remedy under Title VII. 110 Cong. Rec. 2567 (Feb. 8, 1964) (remarks of Rep. Celler, draftsmen of the last sentence of § 706 (g)); 110 Cong. Rec. 2568, 2570 (Feb. 8, 1964) (remarks of Rep. Gill). Developments subsequent to 1964 only strengthen that interpretation of § 706(g).

In the Equal Employment Opportunity Act of 1972, Congress extended Title VII to government employees and reenacted § 706(g) with amendments.[19] 86 Stat. 103, 107 (Mar. 24, 1972). Prior to passage of the 1972 legislation Title VII had been consistently construed as authorizing race-conscious ratios. *E.g.*, *United States* v. *Ironworkers Local 86*, 443 F.2d 544, 553-54 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971) (requiring admission of specific percentages of minorities to apprenticeship programs); *Local 53, Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers* v. *Vogler*, 407 F.2d 1047, 1055 (5th Cir. 1969) (requiring union referral of one black worker for each white worker). In re-enacting

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shows that if Congress had intended to proscribe race-conscious remedies that benefit a group, it would have expressly said so. Moreover, § 703(j), in providing that Title VII does not require group preferences solely to redress racial imbalance, strongly suggests that race-conscious relief is available to remedy independent violations of Title VII. See *Steelworkers* v. *Weber*, 443 U.S. 193, 205-06 (1979).

[19] Specifically, § 706(g) was amended to clarify that "affirmative" relief is "not limited to" orders granting backpay and reinstatement, to make clear that a court may award "other equitable relief" that it deems appropriate, and to specify an accrual date for backpay. 86 Stat. 103, 107. This expansion of the remedial language in § 706(g) is additional proof that Congress did not intend to limit affirmative relief to individual "rightful place" relief.

§ 706(g), Congress ratified the prevailing judicial interpretation of that provision. *Lorillard* v. *Pons*, 434 U.S. 575, 580-81 (1978). Indeed, a section-by-section analysis accompanying the final version of the bill stated: "In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, *Legislative History of the Equal Employment Opportunity Act of 1972* ("1972 Leg. Hist."), p. 1844. Moreover, Congress rejected an amendment designed to overturn the prevailing judicial interpretation that Title VII authorized quota relief.[20]

Thus, Congress, in re-enacting and amending Title VII in 1972, expressly endorsed the prevailing judicial view that the remedial authority conferred by § 706(g) encompasses race-conscious affirmative action that may benefit persons who are not proven victims of discrimination. *United States* v. *Int'l Union of Elevator Constructors Local Union No. 5*, 538 F.2d 1012, 1019-20 (3d Cir. 1976); *United States* v. *IBEW, Local No. 212*, 472 F.2d 634, 636 (6th Cir. 1973); see *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 353 n.28 (1978) (opinion of Brennan, White, Marshall & Blackmun, JJ.)

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[20] Senator Ervin proposed an amendment providing that no agency or officer of the federal government shall require an employer to hire persons of a particular race "in either fixed or variable numbers, proportions, percentages, quotas, goals, or ranges." 118 Cong. Rec. 1662 (Jan. 27, 1972), *reprinted in* 1972 Leg. Hist. at 1039. Senators Javits and Williams spoke against the Ervin amendment, arguing that the amendment would even deprive the courts of power to remedy cases of proven discrimination under Title VII. *Id.* at 1071 (remarks of Sen. Javits); *id.* at 1072 (remarks of Sen. Williams). The amendment was defeated by a vote of 44 to 22. *Id.* at 1074.

("[e]xecutive, judicial, and congressional action subsequent to the passage of Title VII conclusively established that the Title did not bar the remedial use of race").[21]

CONCLUSION

For the reasons stated in Part I, the judgment of the court of appeals should be vacated and the case remanded with directions to dismiss as moot. Should this Court reach the merits, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[21] *Steelworkers* v. *Weber*, 443 U.S. 193 (1979), holds that an employer may voluntarily implement remedial racial ratios without violating Title VII's prohibition against racial discrimination. In light of that holding, it would indeed be anomalous to hold that Title VII prohibits federal courts from granting race-conscious relief for proven violations of the title. The district court in *Weber* had disallowed the voluntary quota system because "the courts alone are in a position to afford due process to all concerned in determining the necessity for and in fashioning such relief." 415 F. Supp. 761, 767-68, *aff'd*, 563 F.2d 216 (5th Cir. 1977), *rev'd*, 443 U.S. 193 (1979).

Nos. 82-206 and 82-229

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FIREFIGHTERS LOCAL UNION NO. 1784,
Petitioner,
—v.—
CARL W. STOTTS, et al.,
Respondents.

MEMPHIS FIRE DEPARTMENT, et al.,
Petitioners,
—v.—
CARL W. STOTTS, et al.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 82-206 and 82-229

FIREFIGHTERS LOCAL UNION NO. 1784,

Petitioner,

—v.—

CARL W. STOTTS, et al.,

Respondents.

MEMPHIS FIRE DEPARTMENT, et al.,

Petitioners,

—v.—

CARL W. STOTTS, et al.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national organization dedicated to achieving equal employment opportunities for Mexican Americans and other Americans of Hispanic heritage. MALDEF has pursued this objective in part by serving as counsel of record in employment discrimination actions. It has also presented its views, as *amicus curiae*, to the United States Courts regarding

employment discrimination issues of importance to Hispanics. The availability of the relief directed by the District Court in this case and challenged on this appeal is such an issue.

Hispanics, like blacks, endure the persistent effects of employment discrimination throughout the United States. Hispanics who aspire to the equality of employment opportunities guaranteed by Title VII of the Civil Rights Act of 1964 must have some assurance that gains in hiring and employment won through litigation will not be eradicated by an employer's response to developments unforeseen at the time of suit. In this case, the Court is called upon to review a district court decree that protects gains in minority hiring and promotion threatened by circumstances arising after entry of a consent decree settling a Title VII action. In light of the importance of this issue for the Hispanic community, MALDEF submits this brief urging affirmance of the decision below.[1]

INTRODUCTION

At issue on this appeal is the power of a federal district court to preserve legally mandated gains in the hiring and promotion of minorities, made pursuant to a judicially enforceable consent decree, when those gains will be substantially diminished by an employer's actions in response to circumstances unforeseen when the parties entered into the decree.

Two separate actions, one a Government pattern and practice suit initiated by the Department of Justice in 1974 and the other a private class action filed by Respondent Carl W. Stotts in 1977, were brought against the City of Memphis and its Fire Department (hereinafter collectively referred to as "the City") under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and related statutes. In both cases, the parties reached negotiated settlements. These settlements were embodied in consent decrees (the "1974 Decree" and the "1980 Decree", respectively) that commit the City to the goal of

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1 The parties have consented to the submission of this brief, and their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

achieving, within each job classification in the Fire Department, minority representation approximating the minority representation in the civilian labor force. Partial, but by no means complete, achievement of this goal had been attained by 1981 when an unforeseen change in the economic climate prompted the City to initiate a lay-off program. If implemented, this program would have substantially undone the gains in minority hiring and promotions that had been made under the decrees. After the program was announced, the private plaintiffs sought equitable relief solely to preserve the partial remedy already accomplished. The result was the preliminary injunction at issue here, which enjoins the City from applying its lay-off program to decrease the percentage of blacks in certain job classifications within the Fire Department.[2]

SUMMARY OF ARGUMENT

Under longstanding precedent, the district courts possess the authority to modify a consent decree in light of unforeseen circumstances that have arisen following its entry. This equitable power is properly exercised when, as here, a change in circumstances threatens to frustrate the remedial program set forth in the decree. The seniority-based layoffs proposed by the City of Memphis for its Fire Department would have reversed the progress made in hiring and promoting blacks into positions from which they had historically been excluded. The District Court, in a careful exercise of its equitable discretion, entered a preliminary injunction that preserved the status quo by preventing the City from reducing the percentage of blacks within each Fire Department rank pending a hearing on the merits. This limited relief falls squarely within the equitable power of the court to preserve the efficacy of the earlier remedial order.

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2 MALDEF joins in Respondents' argument that, because those white employees laid off due to the preliminary injunction were reinstated shortly thereafter, the case is now moot.

The relief ordered in the preliminary injunction is fully consistent with the broad remedial scope of Title VII. The preliminary injunction preserves the relief ordered in the consent decree, but imposes no additional burdens on defendants. Because the 1980 Decree was designed to eliminate the present effects of past discrimination, the preliminary injunction plainly falls within the authority of the courts under Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), to order all appropriate "affirmative action." Title VII relief, moreover, is not limited to adjudicated victims of discrimination; Petitioners' argument to the contrary is contradicted by the legislative history of Section 706(g) and by numerous decisions of the federal courts.

The preliminary injunction is not prohibited by Title VII even though it affects the expectations of white employees. The intrusion is minimal. Since *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), grants of permanent retroactive seniority have been widely available when necessary to fulfill the objectives of Title VII, even where employees enjoy seniority benefits under a bona fide seniority plan. The equitable relief ordered by the District Court was necessary to preserve the effectiveness of the remedy previously ordered and intrudes far less on the operation of seniority than does the remedy of full permanent retroactive seniority authorized in *Franks* and *Teamsters*.

Because the District Court neither abused its discretion nor exceeded its authority, its entry of the preliminary injunction should be affirmed.

ARGUMENT

I. THE DISTRICT COURT HAD THE POWER TO MODIFY THE 1980 DECREE AND PROPERLY EXERCISED THAT POWER

The Court of Appeals, in sustaining the District Court's preliminary injunction, ruled both that the relief was based on a proper construction of the 1980 Decree as written and, alternatively, that the injunction fell within the equitable power of a court to modify a consent decree in light of changed circumstances. Assuming that the preliminary injunction does in fact "modify" the original decree, the Court of Appeals was clearly correct in its ruling.

It is a principle of longstanding that a district court has the power to modify a consent decree in light of changed circumstances "to adapt its restraints to the needs of a new day." *United States v. Swift & Co.*, 286 U.S. 106, 113 (1932). As Justice Cardozo wrote for the Court: "We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent." *Id.* at 114. This power is "inherent in the jurisdiction of the chancery," *id.*, and exists whether or not the decree expressly reserves to the court the authority to modify the decree, *id.*; *see Chrysler Corporation v. United States*, 316 U.S. 557, 567 (1942) (Frankfurter, J., dissenting). It is appropriately exercised where a change in circumstances prevents the decree from achieving the remedy agreed upon by the parties.

A district court's exercise of its power to modify a consent decree will be overturned only if entry of the modification amounts to an abuse of discretion. This Court, in *Chrysler Corporation v. United States*, defined the narrow scope of review as follows:

> The question is whether the change . . . amounted to an abuse of this power to modify. We think that the test to be applied in answering this question is whether the change served to effectuate or to thwart the basic purpose of the original consent decree.

316 U.S. at 562. Applying this test in *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968), the Court held that where a decree has failed to achieve its "principal objects," it is appropriate "to prescribe other, and if necessary more definitive, means to achieve the result." *Id.* at 251-52.[3] As noted in *Gautreaux v. Pierce*, 535 F. Supp. 423, 426 n.7 (N.D. Ill. 1982), "If a plaintiff can show that modification of the decree is crucial to the effectuation of the purpose the decree was intended to achieve, then a grievous wrong would be perpetrated if the decree was not modified."

United States v. Armour & Co., 402 U.S. 673 (1971), relied upon by Petitioners, does not disturb these principles. In *Armour*, the Court held that construction of a consent decree must be conducted within the "four corners" of the decree. The opinion, however, did not purport to alter the standards applicable to requests for *modification* of a decree; to the contrary, the Court suggested that "if the Government believed that changed conditions warranted further relief [beyond that provided for in the original consent decree], it could have sought modification of the [decree] itself." *Id.* at 674-75 (citing *Chrysler Corporation v. United States*, *supra*). In addition, the Court observed that there "might be a persuasive argument for modifying the original decree, after full litigation, on a claim that unforeseen circumstances now made additional relief de-

3 Citing *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932), the Firefighters Union suggests that modification of the 1980 Decree cannot be upheld unless changed circumstances have transformed the original decree into an "instrument of wrong." The *Swift* Court's insistence on a "clear showing of grievous wrong," 286 U.S. at 119, however, applies only to applications by parties seeking to *reduce* their obligations under a consent decree, not to requests for modification by the beneficiary of the decree's remedial program. *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 248-49 (1968). It is not the consent decree that constitutes the "wrong" for the beneficiary of the relief therein, but the prior practices that led to the injunctive provisions of the decree. When, in light of changed circumstances, the decree no longer effectively prevents the harm against which it was intended to guard, the question relevant to an application for modification is that identified in *Chrysler*: whether the proposed modification is needed to effectuate the goals embodied in the decree. *See United Shoe*, 391 U.S. at 249-51.

sirable to prevent the evils aimed at by the original complaint." 402 at U.S. at 681. More recently, this Court has reiterated that a party may petition for modification of a consent decree if it believes that changed circumstances warrant further relief. *See United States v. ITT Continental Baking Co.*, 420 U.S. 223, 233 n.8 (1975). *See also Environmental Defense Fund, Inc. v. Castle*, 636 F.2d 1229, 1240 (D.C. Cir. 1980) ("sound exercise of judicial discretion may require that terms of a consent decree be modified when there has been a significant change in the circumstances obtaining at the time the consent decree was entered"); *Luevano v. Campbell*, 93 F.R.D. 68, 92-93 (D.D.C. 1981) (court has power "to modify the obligations of the Consent Decree in order to further its purposes in light of unforeseen problems which may arise").

In the present case, it is plain that, to the extent (if any) that it modified the 1980 Decree, the District Court's preliminary injunction "served to effectuate" rather than "thwart" the objects of the original decree.

The "evil aimed at" in this Title VII action was the exclusion of blacks from all levels of the Memphis Fire Department. The 1980 Decree strikes at this evil by requiring progress in the hiring and promotion of blacks until their representation in the Memphis Fire Department approximates their representation in the civilian work force. By accepting the 1980 Decree, moreover, the plaintiffs agreed to forego pursuit of other relief, *e.g.*, back pay (beyond a $60,000 award provided in the settlement) and full retroactive seniority. The lay-offs proposed by the City would have effectively deprived plaintiffs of the benefit of their bargain in agreeing to the consent decree. *See, e.g., Kirke la Shelle Co. v. Armstrong*, 263 N.Y. 79, 87, 188 N.E. 163, 167 (1933) (every contract contains "an implied covenant that neither party shall do anyting which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract"); Burton, *Breach of Contract and the Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369 (1980).

The goal of proportional representation had been achieved to only a limited degree when the City announced its intention

to lay-off members of the Department. All parties agree that the proposed lay-offs would have disproportionately affected black fire fighters and officers; progress in minority hiring and promotion would largely have been undone. Disproportionate numbers of blacks in supervisory positions such as lieutenant would have been reduced in rank, thereby negating the advances made in minority promotions under the 1980 Decree.[4] In addition, disproportionate numbers of blacks at the lowest rank would have been laid off, thereby diminishing overall black representation in the Department. As the Court of Appeals noted, "[T]he application of the lay-off policy to the job classifications selected by the City would have virtually destroyed the progress belatedly achieved through affirmative action. The City contracted in 1974 and 1980 to accomplish precisely that which the lay-offs would destroy: a substantial increase in the number of minorities in supervisory positions." 679 F.2d at 561. Had the City been allowed to proceed, the plaintiffs would have been deprived of the very remedy in exchange for which they gave up their right to pursue remedies of back pay and full retroactive seniority. *See* Burton, *supra*, 94 Harv. L. Rev. at 387.

Because the proposed lay-offs would have vitiated the intended effects of the 1980 Decree, the District Court, under the authorities cited above, properly exercised its equitable discretion to halt the proposed City action. The Court's preliminary injunction is carefully limited to avoid interference with the operation of the Memphis Fire Department and to minimize any infringement of the interests of other employees.[5] It does no more than prevent the City from reducing the percentage of

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4 The City acknowledges that, of 36 proposed demotions, 26 would have affected blacks. This disparity was most pronounced at the lieutenant rank, where 16 of 29 black lieutenants (55%) would have been demoted to driver or private, while only 1 of 211 white lieutenants (0.5%) would have been so affected. *See* Brief for Petitioners Memphis Fire Department *et al.* at 7 n.11.

5 Compared with the range of possiblities available to the District Court, the relief ordered was strikingly modest. The Court, for example, did not direct that the City, during its fiscal crisis, make continued progress

minorities in each job classification. While furthering the objectives of the 1980 Decree, the relief carefully accommodates the interests of all employees affected by the preliminary injunction. The District Court engaged in a sound exercise, not an abuse, of its equitable discretion.

The decisions in other employment discrimination cases further confirm the propriety of the District Court's action. Courts confronted with facts virtually identical to those presented here have modified consent decrees without hesitation to prevent eradication of gains in minority employment. *See Boston Chapter, NAACP v. Beecher*, 679 F.2d 965 (1st Cir. 1982), *vacated and remanded for a determination of mootness*, 103 S.Ct. 2076 (1983); *Brown v. Neeb*, 644 F.2d 551 (6th Cir. 1981) (consent decree pursuant to 42 U.S.C. §§ 1981, 1983).

Petitioners and various *amici* suggest that the District Court's action will deter settlement of other Title VII cases, since parties will be reluctant to agree to consent decrees that might be revised at some point in the future in light of unforeseen circumstances. This line of reasoning is unpersuasive.

As the precedents cited above establish, a court has power to modify a consent decree only in a manner that will advance the goals originally agreed to by the parties and comprehended by the decree. Modification in accordance with this standard does not disrupt the legitimate expectations of the parties; it merely ensures that unforeseen circumstances will not defeat a remedial program whose success was anticipated by both parties to the decree. This long-established equitable power must be regarded as a part of the informed expectations of litigating parties and their attorneys. Because affirmance of the decision below would represent no augmentation of the equitable power of a district court, there is no basis for apprehension that the prospects for settlement of other cases will be impaired.

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toward the goals set forth in the 1980 Decree. The preliminary injunction actually imposed *no* additional burdens on the City, since it did not compel the City to retain more members of the Fire Department than the City determined to be appropriate. The relief instead was a temporary, limited measure directed exclusively to preservation of the limited progress already achieved under the 1980 Decree.

II. TITLE VII MANDATES THE RELIEF AWARDED IN THE PRELIMINARY INJUNCTION

Petitioners and several *amici* also maintain that the preliminary injunction contravenes the provisions of Title VII. They argue that the relevant remedial provision of Title VII, Section 706(g), 42 U.S.C. § 2000e-5(g), prohibits the granting of any relief to persons who have not been adjudicated victims of discrimination prohibited by Title VII. They also argue that, even if Section 706(g) permits the award of certain types of relief to persons not adjudicated victims of discrimination, the preliminary injunction impermissibly granted a form of retroactive seniority which *is* limited to adjudicated victims of discrimination. These arguments find no support in the language or purpose of Title VII, and the relevant decisions of this Court argue strongly to the contrary.

A. Section 706(g) of Title VII Does Not Limit Relief to Adjudicated Victims of Discrimination

In enacting Title VII, "Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to 'secur[e] complete justice.' " *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) ("*Moody*") (quoting *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503 (1836)). Congress intended that, through the exercise of this plenary authority, the courts would "fashion the most complete relief possible." 422 U.S. at 421 (quoting 118 Cong. Rec. 7168 (1972) (remarks of Sen. Williams)).

These broad equitable powers are granted by Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g). Section 706(g) explicitly empowers the district courts to "order such affirmative action as may be appropriate." Affirmative action remedies have frequently included hiring and promotion goals for minority employees (such as those contained in the 1974 and 1980 Decrees), *see, e.g., Chisolm v. United States Postal Service*, 665 F.2d 482 (4th Cir. 1981); *United States v. City of Alexandria*, 614 F.2d 1014 (5th Cir. 1980); *Prate v. Freedman*, 583 F.2d 42 (2d Cir. 1978), as well as awards of retroactive

seniority to prevailing class members, *see, e.g., International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) ("*Teamsters*"); *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976) ("*Franks*").

In fashioning the complete remedy required by Section 706(g), the district court must fulfill *two* objectives of Title VII. First, as Petitioners and the Department of Justice emphasize, the court must provide complete "make-whole" relief, so that identifiable victims of discrimination will be placed in the economic position they would have enjoyed in the absence of discrimination by the employer. *See, e.g., Franks*, 424 U.S. at 763; *Moody*, 422 U.S. at 418-19.

"Make-whole" relief, however, does not exhaust the reach of Title VII. There is a second goal. "[A] primary objective of Title VII is prophylactic: to achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees." *Teamsters*, 431 U.S. at 364. Thus, the court has "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Teamsters*, 431 U.S. at 364 (quoting *Moody*, 422 U.S. at 418).[6]

Because eliminating the present effects of past discrimination is no less important an objective under Title VII than the providing sufficient "make-whole" relief, remedies under Section 706(g) have never been limited to adjudicated victims of the employer's discrimination. The twelve circuits are unanimous in upholding hiring and promotion goals not limited to adjudicated victims of discrimination, explicitly or implicitly because such remedies are necessary to eliminate the present effects of past discrimination.[7] As Judge Charles Clark explained in *NAACP v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974):

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6 *See Berkman v. City of New York*, 705 F.2d 584, 596 (2d Cir. 1983) ("Affirmative relief is that designed principally to remedy the effects of discrimination that may not be cured by the granting of compliance or compensatory relief.").

7 *See, e.g., McKenzie v. Sawyer*, 684 F.2d 62 (D.C. Cir. 1982); *Boston Chapter, N.A.A.C.P., Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert.*

> The use of quota relief in employment discrimination cases is bottomed on the chancellor's duty to eradicate the continuing effects of past unlawful practices. By mandating the hiring of those who have been the object of discrimination, quota relief promptly operates to change the outward and visible signs of yesterday's racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices. It is a temporary remedy that seeks to spend itself as promptly as it can by creating a climate in which objective, neutral employment criteria can successfully operate to select public employees solely on the basis of job-related merit.

Limiting relief under Section 706(g) to adjudicated victims of proven discrimination could only obstruct enforcement of Title VII. If an adjudication were required, it would be impossible to award class-wide relief under a consent decree; each plaintiff who seeks such relief would be forced to go to trial, despite the efforts by Congress and the Court to foster settlement of Title VII claims. *See, e.g., Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Even if an increase in the number of Title VII trials were desirable, the ability of the district courts to desegregate previously all-white work forces would depend on the fortuitous availability of all

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denied, 421 U.S. 910 (1975); *Prate v. Freedman*, 583 F.2d 42 (2d Cir. 1978); *EEOC v. American Telephone and Telegraph Co.*, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); *Chisholm v. United States Postal Service*, 665 F.2d 482 (4th Cir. 1981); *United States v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1981); *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir.), *modified*, 712 F.2d 222 (6th Cir. 1983); *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir.) (en banc), *cert. denied*, 406 U.S. 950 (1972); *Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918 (10th Cir. 1979). Under *Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), panels of the Eleventh Circuit remain bound by Fifth Circuit decisions rendered prior to October 1, 1981, such as *United States v. City of Alexandria*, *supra*.

persons who were victims of the employer's discriminatory practices. As the Third Circuit has observed, all of the victims of an employer's illegal practices are unlikely to be available; race-conscious remedies are therefore necessary "to counteract the effects of discriminatory practices upon the balance of sex and racial groups that would otherwise have obtained." *EEOC v. American Telephone & Telegraph Co.*, 556 F.2d 167, 180 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978) ("*AT&T*"); *accord*, *Baker v. City of Detroit*, 483 F. Supp. 930, 993-94 (E.D. Mich. 1979), *aff'd sub nom. Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir.), *modified*, 712 F.2d 222 (6th Cir. 1983).

Both the 1980 Decree and the preliminary injunction at issue here fulfill these important objectives of Title VII. The Sixth Circuit held that the race-conscious employment goals in the decree were a reasonable means of ameliorating the present effects of past discrimination and of desegregating the Fire Department. 679 F.2d at 553-56. The preliminary injunction, by preserving for the successful class members the benefits of the consent decree until there is a hearing on the merits, equally serves those goals.[8]

Even though the 1980 Decree and the preliminary injunction are plainly the type of "affirmative action" mandated by Section 706(g), the Justice Department implausibly interprets the final sentence of Section 706(g) to prohibit an award of relief to any except proven victims of discrimination. This sentence provides that:

> No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, *if such individual was refused* admission, suspended, or expelled, or was refused employment or advancement or

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8 Of course, to the extent that beneficiaries of the 1980 Decree and the preliminary injunction *were* victims of discrimination by the Fire Department, the relief serves the "make-whole" objective of Title VII as well.

> was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(Emphasis added.)

By its terms, this sentence does not apply to the relief ordered in the preliminary injunction. In exempting some members of the prevailing class from lay-offs, the preliminary injunction does not order "the hiring, reinstatement, or promotion" of any person. However, even if this sentence did apply to the preliminary injunction, it would not prohibit the relief ordered by the District Court.

No court has ever adopted the Justice Department's novel interpretation of Section 706(g), and this reading was explicitly rejected by the Third Circuit in *AT&T*. The statute prohibits the courts only from ordering the hiring, reinstatement, or promotion of an individual "if *such* individual was refused . . . employment or advancement or was suspended or discharged for any reason other than discrimination on account or race, color, religion, sex, or national origin . . . ." This language applies only to those persons who previously sought employment or promotion but had been rejected by the employer for nondiscriminatory reasons (*e.g.*, because they were unqualified); it makes no reference to persons who had not sought employment or promotion and thus does not prohibit their hiring under a remedial affirmative action plan.

Instead, the quoted language reflects Congress's intent that persons who had been refused employment or promotion (or who had been fired) for legitimate, nondiscriminatory reasons could not invoke the strong remedial provisions of Section 706(g) to obtain employment or promotion. *AT&T*, 556 F.2d at 176; 110 Cong. Rec. 2567 (1964) (remarks of Rep. Celler in introducing this language); Vaas, *Title VII: Legislative History*, 7 B.C. Ind. & Com. L. Rev. 431, 438 (1966). In enacting Title VII, Congress did not intend to authorize hiring of unqualified employees. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971). The 1980 Decree approved by the panel more than

complies with this limitation under Section 706(g) because it permits the City to deny employment to any person who is not qualified for the position. *See United States v. City of Alexandria*, 614 F.2d 1358, 1366 (5th Cir. 1980); *AT&T*, 556 F.2d at 176.

In *AT&T*, the Third Circuit, after thoroughly canvassing the relevant legislative history, concluded that the interpretation now advocated by the Justice Department distorted congressional intent. 556 F.2d at 175-77. As the *AT&T* court noted, the section-by-section analysis in the 1964 House Report interpreted the initial House version of Section 706(g), H.R. 7152, 88th Cong., 1st Sess. § 707(e) (1963), as follows:

> *No order of the court may require* the admission or reinstatement of an individual as a member of the union or the hiring, reinstatement, or *promotion of an individual* as an employee or payment of any back pay *if the individual was refused* admission, suspended, or separated, or was refused employment or *advancement*, or was suspended or discharged *for cause*.

H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963) (emphasis added). Like the final language of Section 706(g), this passage reflects only congressional concern that employers not be compelled to hire specific individuals who were unqualified or who were denied employment or promotion for nondiscriminatory reasons.

On the House floor, the proposed section was amended. The grounds on which an employer could refuse to hire or promote "such individual" claiming discrimination were expanded by substituting for the word "cause" the present language, "for any reason other than discrimination on account of race, color, religion, or national origin." *See* 110 Cong. Rec. 2567 (1964). The substitution of this language was designed to prevent plaintiffs pressing spurious claims of discrimination from arguing that an employer's legitimate reason for denying employment or promotion did not qualify as "cause". Representative Celler's explanation in introducing the amendment is authoritative:

> Mr. Chairman, the purpose of the amendment is to specify cause. Here the court, for example, cannot find any violation of the act which is based on facts other—and I emphasize "other"—than discrimination on the grounds of race, color, religion, or national origin. The discharge might be based, for example, on incompetence or a morals charge or theft, but the court can only consider charges based on race, color, religion, or national origin. That is the purpose of this amendment.

110 Cong. Rec. 2567 (1964) (remarks of Rep. Celler). The concluding language of Section 706(g) is therefore concerned exclusively with defining a "violation of the act," *id.*, not with limiting the broad equitable powers granted by Title VII.

The progress of Section 706(g) in the Senate similarly affords no basis for distorting its language to prohibit race-conscious affirmative remedies. The interpretive memorandum offered by Senators Clark and Case stated, in a passage relied upon by Petitioners and their *amici*, that:

> No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not discriminated against in violation of this title. This is stated expressly in the last sentence of section 707(e) [now Section 706(g)] which makes clear what is implicit throughout the whole title; that employers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because of race, color, religion, sex, or national origin.

110 Cong. Rec. 7214 (1964). The passage demonstrates only the Senators' concern that employers be able to refuse employment or promotion to those employees considered unfit for the position without fear that their judgment would be overruled by the provisions of Title VII. It does not address (much less prohibit) the availability of affirmative remedies not restricted to individuals who have proven that they were victims of the employer's practices. Far more relevant is the statement of

Senator Humphrey, a sponsor of Title VII, that the statute was intended to "open employment opportunities for Negroes in occupations which have been traditionally closed to them."[9] 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey).

The legislative history of the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 92d Cong., 2d Sess., 86 Stat. 103 (1972), *codified* (*as amended*) *at* 42 U.S.C. § 2000e *et seq.*, further demonstrates that Title VII remedies are not limited to adjudicated victims of discrimination. The section-by-section analysis of that Act provided by Senators Javits and Williams states that:

> In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

118 Cong. Rec. 3460 (1972).

Congress was unquestionably aware of decisions ordering race-conscious affirmative action remedies. During the debates on the 1972 Act in the Senate, Senator Javits specifically defended the affirmative action remedy ordered in *United States v. Ironworkers, Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971), and inserted a copy of the court's opinion in the Congressional Record. 118 Cong. Rec. 1671-75 (1972).[10]

Thus, the language and legislative history of Section 706(g) leave no doubt of the propriety of race-conscious relief that may benefit persons never adjudicated to have been victims of discrimination.

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9 In *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), the Court relied on this language in upholding a private employer's race-conscious affirmative action plan.

10 In *Ironworkers*, the Ninth Circuit ordered the union to apprentice "sufficient black applicants to overcome past discrimination" without regard to whether an applicant was a proven victim of discrimination. *See* 443 F.2d at 553.

B. The Relief Granted in the Preliminary Injunction Did Not Impermissibly Interfere with the Operation of a Seniority System

Petitioners and their *amici* apparently believe that, even if certain forms of race-conscious relief were authorized under Section 706(g), any race-conscious remedy that intrudes (even minimally) on the seniority expectations of employees outside the plaintiff class can never be granted. The language of Section 706(g), however, contains no such limitation. In fact, the decisions of this Court support the award of relief far more intrusive than the remedy provided in the preliminary injunction if, as here, a valid remedial purpose is served.[11]

The District Court's prohibition of reductions in the percentage of black employees in specified ranks within the Fire Department was designed solely to preserve the partial attainment of the objectives set forth in the initial version of the 1980 Decree. By shielding certain class members from the operation of the City's lay-off plan, the District Court temporarily protected them from a rigorous application of last-hired-first-laid-off seniority principles. That protection was limited in time to the 1981 Memphis fiscal crisis and directed exclusively to protecting job tenure. Unlike recipients of permanent retroactive seniority in Title VII cases, these class members did not receive increased pension rights or time credited towards promotion. This Court's decisions in *Franks*

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11 The discussion in text assumes *arguendo* that the City maintained a bona fide seniority system as that term is used in Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h). Absent a bona fide seniority system, the considerations set forth in *Teamsters* concerning the protection of such systems do not apply. It is by no means clear whether or not the City's lay-off plan, whose terms differ from those of its previous, non-binding (*see City of Alcoa v. International Brotherhood of Electrical Workers Local 760*, 203 Tenn. 12, 308 S.W.2d 476 (1958)) Memorandum of Understanding with the Union, is a bona fide seniority system. Were decision of this factual issue determinative, its resolution should be made first at the trial court level. Resolution of this issue is unnecessary, however, because Respondents would prevail even if the lay-off plan did constitute a bona fide seniority system.

and *Teamsters*, endorsing the wide availability of permanent retroactive seniority, support both the purpose and scope of the more limited relief granted by the District Court in the preliminary injunction.

In both *Franks* and *Teamsters*, defendant employers challenged the availability of an award of class-wide permanent retroactive seniority to successful Title VII plaintiffs. In *Franks*, the Court established a general presumption in favor of granting full retroactive seniority to victims of an employer's discrimination.[12] The Court did not relegate permanent retroactive seniority to the status of rare or extraordinary relief, but instead held that it should ordinarily be awarded unless there was an "unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases." 424 U.S. at 779 n.41. While stressing that the design of the appropriate remedy is left to the sound equitable discretion of the district court, the Court admonished that the district court's discretion must be exercised to "allow the most complete achievement of the objectives of Title VII that is attainable under the facts and circumstances of the specific case." *Id.* at 770-71. *Franks* was primarily concerned with retroactive seniority as a restitutionary "make-whole" remedy. It nowhere limits retroactive seniority to serving exclusively that objective of Title VII, and speaks instead of the "objectives" of the statute.

In *Teamsters*, the Court explicitly validated the employer's seniority system as bona fide, yet reiterated that successful class members were presumptively entitled to permanent retroactive seniority. 431 U.S. at 347. While retroactive seniority in *Teamsters* was sought and granted solely as a matter of

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12 The Court in *Franks* rejected the contention that Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), prevents the district court from awarding retroactive seniority. Section 703(h) states that the maintenance of a bona fide (*i.e.*, nondiscriminatory) seniority system does not constitute actionable discrimination. As this Court explained, Section 703(h) merely defines legal and illegal practices under Title VII; it does not impose a limitation on the district court's remedial authority under Title VII. *See* 424 U.S. at 757-62.

"make-whole" relief, the Court emphasized the importance of other remedial objectives of Title VII, stating (in language we have previously quoted) that "the district courts have 'not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' " *Id.* at 364 (quoting *Moody*, 422 U.S. at 418).

Given (1) the strong presumption in favor of awarding permanent retroactive seniority, (2) the District Court's "duty" to eliminate the present effects of past discrimination, and (3) the deference paid to the court's sound equitable discretion, the preliminary injunction here, which at most temporarily and partially suspended the operation of a seniority program, is not objectionable. The remedial purpose of the 1980 Decree, the elimination of the present effects of past discrimination, was specifically endorsed in *Franks* and *Teamsters*. Those decisions in no way diminish the power and obligation of the District Court to safeguard the efficacy of the relief that it ordered. On the contrary, those decisions approve active pursuit of the prophylactic goals of Title VII, even where, as here, this pursuit may partially disrupt expectations based on seniority. As the First Circuit noted in *Boston Chapter, NAACP v. Beecher*, 679 F.2d 965, 975 (1st Cir. 1982), *vacated and remanded for a determination of mootness*, 103 S.Ct. 2076 (1983), on facts virtually identical to those presented here, "To hold a seniority system inviolate in such circumstances would make a mockery of the equitable relief already granted."

Both *Franks* and *Teamsters* recognize that relief in Title VII cases, including class-wide permanent retroactive seniority, often affects the interests of non-minority employees. *See Franks*, 424 U.S. at 774-79; *Teamsters*, 431 U.S. at 374-76. Yet, as the Court noted in *Franks*,

> If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.

424 U.S. at 775 (quoting *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 663 (2d Cir. 1971)). In *Teamsters*, this Court stated that it is the responsibility of the trial court to resolve the competing interests. *See* 431 U.S. at 375-76. The very limited and necessary relief contained in the preliminary injunction entails far less intrusion on the interests of nonminority employees than did the award of permanent retroactive seniority authorized in *Franks* and *Teamsters*. The District Court sensitively accommodated the interests and expectations of both class members and nonminority employees in fashioning a decree that does no more than safeguard, for the limited duration of the 1981 layoffs, the progress in affirmative action that had already been made.

Petitioners and their *amici* argue that, because there was no finding of discrimination by the City and no adjudication that each class member protected from lay-offs was a proven victim of discrimination, the District Court lacked equitable discretion to issue a preliminary injunction affecting seniority expectations. These arguments treat the 1980 Decree as a procedural nullity without consequences for the defendants.

A consent decree is a court order embodying an agreement by the defendant to provide the plaintiff class with specified relief. *See United States v. City of Miami*, 664 F.2d 435, 439-40 (5th Cir. 1981) (en banc) (plurality opinion). By agreeing to the 1980 Decree, the City waived its right to insist that the plaintiff class prove the City's commission of discriminatory practices, just as the plaintiff class waived its right to seek greater relief (*e.g.*, full retroactive seniority) from the court. The City, in an effort to defeat the District Court's injunction preserving the remedy agreed upon in 1980, cannot now rely on the absence of a finding which it, by its consent, made unnecessary.[13] A

13 However, the District Court could not have approved the 1980 Decree unless it found that the the decree was fair and equitable in light of the plaintiff's showing of a potential violation. Here, both the District Court and, on appeal, the Sixth Circuit carefully reviewed the 1980 Decree and found it fair and equitable. In granting the preliminary injunction, the District Court explicitly took judicial notice (on the basis of both facts in the record and common public knowledge) that the City was guilty of racial discrimination. (Petitions for Cert., App. at 73-74).

contrary rule would render courts of equity powerless to protect the efficacy of relief ordered by consent and would subject litigants to the protracted litigation that the consent decree was designed to avoid.

The Petitioners also mistakenly insist that the District Court could not issue the preliminary injunction without first determining that each recipient was a victim of the City's discriminatory practices. When full retroactive seniority is sought solely as restitutionary "make-whole" relief, *Franks* and *Teamsters* understandably limit such relief to identifiable victims of the employer's practices. (A non-victim neither seeks nor needs restitution.)

In this case, however, the relief granted was not sought as "make-whole" relief. It was awarded pursuant to the District Court's mandate under Section 706(g) to order appropriate affirmative action and pursuant to its power as a court of equity to preserve the integrity of its decrees. Thus, affirmative action was necessary to protect the remedy (albeit partial) achieved under an earlier uncontested decree designed to eliminate the enduring effects of historic discrimination. *Franks* and *Teamsters* hold that, if a class-wide award of permanent retroactive seniority is necessary to achieve the objectives of Title VII, it should be granted notwithstanding its effect on the seniority expectations of employees outside the class. These cases do not hold that retroactive seniority can *never* be granted to individuals not adjudicated victims of the employer's discrimination. Instead, they commit the scope of relief to the sound discretion of the district court. Given the presumption established by these cases in favor of granting a form of seniority relief far more intrusive than that at issue here, the District Court should not be found to have abused its discretion. After considering the equities, the court acted well within its discretion in approving a remedy that has only a limited and temporary effect on seniority while achieving the unexceptionable purpose of effectuating the court's prior decree.

The requirement of an adjudication that each beneficiary was a victim of discrimination, like the requirement of an

adjudication that the defendant had engaged in discriminatory practices, would effectively prevent courts of equity from moving swiftly to preserve the results that have already been achieved under a Title VII consent decree. Such adjudications would be especially inappropriate in the context of a preliminary injuction, which seeks only to protect the *status quo*, prior to a decision by the District Court on the merits.

Even assuming that such individual adjudications were appropriate, this Court held in both *Franks* and *Teamsters* that such adjudications are not a prerequisite to an initial class-wide award of retroactive seniority. In *Franks*, this Court ruled that class-wide permanent retroactive seniority should be awarded by the district court subject to the employer's right, at subsequent proceedings, to object to the award of retroactive seniority to specific employees on an individual basis. *Franks*, 424 U.S. at 772-73. As an indication of the importance given to providing complete relief, the Court placed the burden of proof in such individual proceedings on the employer. *Id.* at 773 n.32. In *Teamsters*, the Court restated these propositions. 431 U.S. at 359 & n.45.[14] Accordingly, individual adjudications, even where appropriate, should occur only following the entry of class-wide retroactive seniority after a hearing on the merits, and *a fortiori* were not required before the entry of the much more modest relief at issue here. The absence of such adjudications prior to issuance of the preliminary injunction affords no basis for disturbing the District Court's ruling.

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14 In *Teamsters*, the court isolated a single discrete group of plaintiffs, those who had never applied for the position of over-the-road driver, and held that, before they enjoyed the presumption in favor of full retroactive seniority, they first bore the burden of establishing that they would have applied for the position but for the employer's discrimination. *See* 431 U.S. at 367-68. There is no indication that such a discrete group exists here, because all employees benefiting from the preliminary injunction were hired prior to the entry of the consent decree in 1980, *see* Brief for Petitioner Memphis Fire Department, Add. A. The less intrustive form of relief granted in the preliminary injunction cannot justify such segmentation in any event.

CONCLUSION

For the foregoing reasons, MALDEF respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Nos. 82-206 and 82-229

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FIREFIGHTERS LOCAL UNION NO. 1784,

Petitioner,

—vs.—

CARL W. STOTTS, et al.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL BLACK POLICE ASSOCIATION, and AMERICAN CIVIL LIBERTIES UNION, *AMICI CURIAE*

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INTEREST OF AMICI*

The National Black Police Association ("NBPA") is a nationwide organization comprised of 85 local black police associations representing more than 20,000 black police officers throughout the United States. The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan organization of over 250,000 members dedicated to protecting the fundamental rights of the people of the United States.

Because of the NBPA's and ACLU's commitment to eradicating and remedying the continuing effects of longstanding discrimination against racial minorities, the NBPA and the ACLU, amici curiae, filed a Brief in support of Respondents in Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP, 103 S.Ct. 2076, 76 L.Ed.2d 330 (1983). For the same reasons, amici file this Brief in support of

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* The parties have consented to the filing of this Brief, and their letters of consent have been lodged with the Clerk of this Court under Rule 36.2 of the Rules of this Court.

Respondents and urge this Court to affirm the judgment of the Sixth Circuit.

ARGUMENT

In our Brief Amici Curiae filed in Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP, 103 S.Ct. 2076, 76 L.Ed.2d 330 (1983), we argued that the trial court was empowered to modify the consent decreee to conform it to unanticipated circumstances; that the modified consent decree violated neither Title VII nor the equal protection clause; and that, if the case were viewed solely from the perspective of economic loss, the employer was required to bear any economic burdens flowing from the initial consent decree.

The facts, issues, and legal arguments in this case are similar to and in many respects identical to those in Boston Firefighters. We accordingly incoporate by reference the Brief of the NBPA and ACLU in Boston Firefighters, and reassert those arguments here.

CONCLUSION

This Court should affirm the judgment of the court below.

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IN THE

Supreme Court of the United States

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FIREFIGHTERS LOCAL UNION NO. 1784,
Petitioner,

—v.—

CARL W. STOTTS, et al.,
Respondents.

MEMPHIS FIRE DEPARTMENT, et al.,
Petitioners,

—v.—

CARL W. STOTTS, et al.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* FOR NATIONAL ORGANIZATION FOR WOMEN; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; EQUAL RIGHTS ADVOCATES, INC.; LEAGUE OF WOMEN VOTERS OF THE UNITED STATES; NATIONAL CONFERENCE OF BLACK LAWYERS; NATIONAL WOMEN'S LAW CENTER; WOMEN EMPLOYED; AND WOMEN'S LEGAL DEFENSE FUND

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INTEREST AND DESCRIPTION OF AMICI CURIAE

This brief amicus curiae in support of respondents is submitted on behalf of the National Organization for Women; American Association of University Women; Equal Rights Advocates, Inc.; League of Women Voters of the United States; National Conference of Black Lawyers; National Women's Law Center; Women Employed; and Women's Legal Defense Fund.*

The National Organization for Women is the largest feminist organization in the United States, with a membership of over 225,000 women and men in more than 750 chapters throughout the country. Since its founding in 1966, a major goal of NOW has been the eradication of sex dis-

*Letters from counsel for all parties, consenting to the filing of this brief, are being filed with the Clerk.

crimination in employment, and the elimination of barriers that deny women economic opportunities and the ability to become economically self-sufficient. NOW believes that economic equality in the paid workforce is fundamental to women's ability to achieve equality in other aspects of society. In furthering its commitment to that goal, NOW has participated in numerous cases and commented on proposed legislation and regulations to secure full enforcement of laws prohibiting employment discrimination.

The American Association of University Women is a national organization of 190,000 college-educated women working for the advancement of women. Dedicated for 100 years to promoting the social and economic well being of all persons, the AAUW affirms its commitment to equal employment opportunity for women and men.

Equal Rights Advocates, Inc. is a San Francisco based, public interest le-

gal and educational corporation specializing in the area of sex discrimination. It has a long history of interest, activism and advocacy in all areas of the law which affect equality between the sexes. ERA, Inc. has been particularly concerned with gender equality in the workforce because economic independence is fundamental to women's ability to gain equality in other aspects of society. This concern has been expressed through ERA, Inc.'s participation, both as counsel and as amicus, in numerous employment discrimination cases.

The League of Women Voters of the United States is a nonpartisan, nonprofit membership organization, incorporated under the laws of the District of Columbia, with a current membership of 113,000 in 1250 state and local Leagues located in all states, the District of Columbia, Puerto Rico, and the Virgin

Islands. Since its inception in 1920, the League's purpose has been to promote political responsibility through informed and active participation of citizens in government. The League believes that no person or group should suffer legal, economic, or administrative discrimination, and is committed to the eradication of discrimination against minorities and women through affirmative action.

The National Conference of Black Lawyers is a membership organization of lawyers, scholars, legal workers, law students and other legal activists in the United States and abroad. The purpose of the organization is to promote and protect the interests of Black men and women in all phases of human life. Among the organization's primary concerns is the elimination of employment discrimination and the implementation and retention of viable affirmative action programs which serve to promote economic

equity for Black men and women in the United States.

The National Women's Law Center is a legal organization, located in Washington, D.C., with the purpose to protect and advance women's rights. The Center represents women's concerns before federal administrative agencies and courts. The Center has been involved in issues affecting the employment rights of women, and in particular has handled cases involving employment of women in nontraditional jobs.

Women Employed is a national organization, based in Chicago, with a membership of 3,000 women workers. Over the past ten years, the organization has assisted working women with problems of sex discrimination. Women Employed also monitors the enforcement, actions and policies of the EEOC and Office of Federal Contract Comliance Programs with regard to a broad range of sex discrimination issues.

Women's Legal Defense Fund is a non-profit, tax exempt membership organization, founded in 1971 to provide pro bono legal assistance to women who have been discriminated against on the basis of sex. The Fund devotes a major portion of its resources to combatting sex discrimination in employment, through litigation of significant employment discrimination cases, operation of an employment discrimination counselling program, public education, and agency advocacy before the EEOC and other federal agencies that are charged with enforcement of equal opportunity laws.

These organizations are dedicated to the principle of equal treatment under the law and to the elimination of sex and race discrimination in employment. Amici believe that the case before the Court is of great importance to the ability of the federal courts to provide effective remedies for employment discrimination.

SUMMARY OF ARGUMENT

The petitioners in this case ask the Court to subordinate a judicially-approved remedial order to a seniority-based layoff plan which threatened to wipe out the progress made, pursuant to consent decrees approved by the district court in 1974 and 1980, toward racial and sexual integration of the Memphis Fire Department.* The ability of the federal courts to protect remedial decrees, at issue in this case, directly affects the ability of women of all races and ethnic groups to obtain and maintain employment in state and local government services.

Systematic exclusion of women from employment in the protective services has been judicially acknowledged, and courts have acted to remedy the effects of this

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* Amici adopt the argument that this case is moot as contained in the brief for respondent.

discrimination. Increased availability of employment in municipal protective services is a critical factor in the struggle of many women to be economically self-sufficient. One of the most significant current demographic trends is the dramatic increase in the poverty of women. Institutionalized sex discrimination contributes to this trend and confines women to low status, low paying jobs. The serious economic plight of women underscores the critical importance of removing barriers to equal employment opportunity.

The national policy to eliminate discrimination in both public and private sectors, through Congressional legislation, is clear. However, despite enactment of various statutes prohibiting discrimination, minorities and women are still struggling to achieve equality. In addition to hiring barriers, the "last hired, first fired"

practice for structuring layoffs disproportionately affects women and minorities in a way that can eviscerate the modest progress made to date in integrating the work force. In order to enforce the broad policies against employment discrimination, the courts must be free to approve affirmative action plans, taking into consideration the effects and goals of such plans and the seniority expectations of the nonminority employees.

District courts are vested with broad equitable powers. To effectively address race and sex discrimination, the courts must retain flexibility and should not be deprived of the ability to employ practical wisdom in structuring remedies. In the instant case, the goals of the 1974 and 1980 consent decrees had not yet been accomplished when the layoff proposal was announced. There was sufficient evidence of discrimination in the record to support the district court's order.

ARGUMENT

POINT I

THIS CASE RAISES ISSUES HAVING A SIGNIFICANT IMPACT ON WOMEN'S OPPORTUNITIES TO BECOME ECONOMICALLY SELF-SUFFICIENT

In the instant case, this Court is presented with some of the consequences of the pervasive history of race discrimination in employment in a uniformed municipal service. No less severe, however, has been the systematic exclusion of women of all races from such protective services jobs as firefighting. The effects of the history of sex discrimination in protective services employ-

ment are being remedied very slowly.[1/] The ability of the federal courts to protect remedial decrees, at issue in this case, directly affects the ability of all women to obtain and maintain employment in state and local government services.

Historically, women have been effectively barred from state and local uniform protective services by a variety of practices. One of the most common policies has been the complete segregation of women within the protective services, and their confinement to a few low-prestige jobs "appropriate" to their sex.

[1/] In New York City, for example, the qualifying test for firefighters was found to be sex discriminatory in 1982, N.Y. Times, Nov. 6, 1982, at 32, col. 5. The first women recruits for the New York City fire department entered training on September 22, 1982. N.Y. Times, Nov. 6, 1982, at 29, col. 3, and were sworn in as members of the force on November 5, 1982. Id.

> [Women] were not permitted to compete with men on [police] entrance examinations. Their eligibility was limited to a relatively few positions as 'police women' and 'police matrons'. They were given limited responsibility, primarily for processing, searching and care and custody of women prisoners and a limited amount of youth work. They were not used for patrol work. United States v. City of Chicago, 385 F. Supp. 543, 548 (N.D. Ill. 1974).

Additionally, women have been required to meet stricter educational criteria than men, mandating more years of formal education than men, e.g., Schaefer v. Tannian, 394 F. Supp. 1128, 1130 (E.D. Mich. 1974) (police). Moreover, not only have women been relegated to sex-segregated jobs, some departments have maintained strict quotas on the number of women hired. Id. at 1131. Sex-segregated schedules of entrance examinations have also been maintained, affording women substantially fewer opportunities than men to apply for the handful of positions open to them. Id. at 1130.

As a result of these widespread discriminatory practices, the participation of women in the uniformed state and municipal services has been extremely low. In 1960, women comprised only 4.1% of all workers in protective service occupations,[2/] Bureau of Labor Statistics, U.S. Dept. of Labor, Perspectives on Working Women: A Databook 10, Table 11 (1980). By 1981, the percentage had risen to 10.1%. Bureau of Labor Statistics, U.S. Dept. of Labor, Employment and Earnings 141 (March 1982). Since women now constitute more than 42% of the paid labor force, these percentages

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[2/] The Bureau of the Census category of "protective service" work includes fire inspection and fire prevention occupations, firefighting occupations, police and detectives, sheriffs, bailiffs and other law enforcement officers, correctional institution officers, crossing guards, guards and police. Bureau of the Census, U.S. Dept. of Commerce, Classified Index of Industries and Occupations XIV (Nov. 1982).

reflect a gross underrepresentation of women.[3/]

Prior to 1972, when Title VII was amended to extend coverage to state and local government employment (Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C.A. §2000e et seq. (West 1981)), women were barely employed in the protective services at all. They constituted less than 3% of police, less than 5% of guards, and roughly one-half of one percent of all firefighters in 1972. Bureau of the Census, U.S. Dept. of Commerce, Statistical Ab-

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[3/] The percentages of women in these occupations vary dramatically among occupations, although women are substantially underrepresented in all. In 1981, women constituted 0.9% of all firefighters, 5.7% of all police officers, 7% of all sheriffs and bailiffs, and 13.7% of all guards. Bureau of Labor Statistics, U.S. Dept. of Labor, Employment and Earnings 141 (March 1982).

stracts of the United States: 1981, 420 (1981).[4/]

Not surprisingly, since the enactment of the 1972 amendments, numerous cases alleging sex discrimination in protective services employment have been brought in the federal courts. A sampling of these cases shows a consistent pattern of denial of opportunities to women. In 1974, none of the firefighters in 45 Louisiana municipalities and parishes were women, United States v. City of Alexandria, 614 F.2d 1358, 1365 n.14 (5th Cir. 1980). In 1974, women constituted slightly over 2% of the police officers in Detroit, Schaefer v. Tannian, 394 F. Supp. at 1130; in 1973, women comprised less than 1% of the police

4/ Figures for the category of "sheriffs and bailiffs" are not available for this period.

officers in Chicago, United States v. City of Chicago, 385 F. Supp. at 548. In 1979, only 2.3% of the police officers in the cities of Yonkers and White Plains, New York were women, Complaint, United States v. City of Yonkers, 80 Civ. 7407 (S.D.N.Y. 1979), although in 1977 more than 20% of the applicants for officer positions in White Plains were women. Stipulation, id. (April 1981). In 1977, only three out of 91 trainees in the Nassau County, New York police academy were women. Memorandum and Order, United States v. Nassau County Police Dept., No. 76 C1869, at 15 (E.D.N.Y. July 21, 1978).[5/]

Women have not been comparably excluded from low-paid, low prestige civilian clerical and support jobs in the state and municipal services. In Nassau County, for example, in 1977 women constituted 0.6%

[5/]The other 88 trainees were white men.

of the sworn police department employees, but 78.9% of the civilian personnel in the department. Id. at 14.

Faced with clear and dramatic evidence of sex discrimination, the federal courts have found liability and provided for effective relief, including percentage hiring goals. See, e.g., United States v. City of Alexandria, 614 F.2d at 1368 (consent decree covering firefighter and police hiring); Schaefer v. Tannian, 394 F. Supp. at 1135 (order covering police hiring); United States v. City of Buffalo, 633 F.2d 643, 647 (2d Cir. 1980) (order covering firefighter and police hiring); United States v. City of Philadelphia, 499 F. Supp. 1196, 1204 (E.D. Pa. 1980) (injunction covering police hiring). In so doing, the courts have recognized both the importance of opening municipal service employment to women and the necessity of court orders to

assure the initial and continuing availability to women of these fundamentally important employment opportunities. In remedying the effects of sex discrimination, like racial discrimination, rigorous judicial scrutiny and remedial action are the strongest tools to prevent backsliding and solidifying the progress already made in the integration of municipal protective services.

Increased availability of employment in municipal protective services is important to the efforts of many women to become economically self-sufficient. The desperate economic position of women in our society--and growing poverty of women and children generally--is today widely acknowledged. See, e.g., Nat'l Advisory Council on Economic Opportunity. Critical Choices for the 80's (1980) [hereinafter cited as Critical Choices]; U.S. Comm'n on

Civil Rights, Women Still in Poverty (1979). Nearly one-third of all female-headed households are living below the poverty line, while only one in 18 male-headed households is in a similar position. Critical Choices at 17.[6/] In 1980, families maintained by women alone had the lowest median annual income of all families. Bureau of the Census, U.S. Dept. of Commerce, Characteristics of Households and Persons Receiving Selected Non-Cash Benefits: 1980 9 (1982) [hereinafter, Characteristics].

The situation is particularly grim for women with young children. In 1978, the median income of families headed by women

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[6/] Between 1980 and 1981, the number of poor families headed by women increased by 231,000, Bureau of the Census, U.S. Dept. of Commerce, Money Income and Poverty Status of Families and Persons in the United States: 1981 (Advance Data from the March, 1982 Current Population Survey) 3, Table B (1982).

whose children were under six was only $4,498, 30% of the median income for all families with children under six. Bureau of the Census, U.S. Dept. of Commerce, Families Maintained by Female Householders 1970-79 36 (1980). The National Advisory Council on Economic Opportunity has estimated that if current demographic trends continue, this nation's impoverished class by the year 2,000 will be comprised exclusively of women and children. Critical Choices at 19.

Among the major factors contributing to the precarious financial position of women are pervasive sex discrimination and job segregation in the workforce. Women comprise 42% of the workforce nationwide. Bureau of Labor Statistics, U.S. Dept. of Labor, Perspectives on Working Women: A Databook 3 Table 1 (1980). Yet, they are

concentrated in a small number of occupations which are marked by low pay and limited opportunities. In 1981, half of the 43,000,000 women in the paid labor force were employed in only 20 occupations. Bureau of Labor Statistics, U.S. Dept. of Labor, Employment and Earnings (March 1982). While 22% of all men were in three of the major occupation groups (sales, clerical and service), 64% of the women were employed in these occupations. Bureau of the Census, U.S. Dept. of Commerce, Wage and Salary Data from the Income Survey Development Programs 1979 3 (1982). There is evidence that the occupational segregation of women is increasing. For example, in late 1981 almost 75% of all clerical workers were women, Bureau of Labor Statistics, U.S. Dept. of Labor, Employment and Earnings 22 Table A-21 (1982), as compared with 62% in 1950. Bureau of Labor

Statistics, U.S. Dept. of Labor, Employment in Perspective: Working Women 1 (Report No. 544, 1978).

Further, the wages for "women's jobs" lag behind those categories that are traditionally male jobs. The 1977 weekly wage for 18 of the "women's jobs" ranged from $59 for private household workers to $171 for sewers and stitchers. Bureau of Labor Statistics, U.S. Dept. of Labor, News: Trends in Weekly and Hourly Earnings for Major Labor Force Groups, Tables 1-3 (Nov. 2, 1977). In contrast, the 1977 average weekly wage for male-dominated jobs such as construction ($297), transportation and public utilities ($275), and motor vehicle retailers ($208) was far better. U.S. Comm'n on Civil Rights, Women Still in Poverty 19 (1979). But even within predominantly female occupations, women's wages are significantly below those received

by men. On average, a female sales worker, for example, is paid only 52% of wages paid to a male sales worker. Bureau of the Census, U.S. Dept. of Commerce, Money Income of Households, Families, and Persons in the United States: 1980 Table 55 (July 1982). Female clerical workers receive only 59% of the wages paid to male clerical workers. Id.

In view of persistent job segregation and the concomitant wage gap, it is not surprising that the median earnings of women in the paid work force is one half the median earnings of men. Bureau of the Census, U.S. Dept. of Commerce, Wage and Salary Data from the Income Survey Development Program: 1979 3, Table 1 (1982). The serious economic plight of women underscores the critical importance of removing barriers to equal employment opportunity.

It is only through assuring women truly equal access to jobs that we as a society can reverse these current trends and give women the real possibility of achieving economic self-sufficiency for themselves and their families.

POINT II

FEDERAL ANTI-DISCRIMINATION POLICY REQUIRES EFFECTIVE REMEDIES FOR EMPLOYMENT DISCRIMINATION BY GOVERNMENT EMPLOYERS

A. The 1972 Amendments to Title VII of the Civil Rights Act of 1964 Were Enacted to Redress Widespread Employment Discrimination In State and Local Government Employment

This Court has emphatically recognized that the intent of Congress, in enacting Title VII of the Civil Rights Act of 1964, was to "assure equality of employment opportunity and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973). See also United Steelworkers of America v. Weber, 443 U.S. 193 (1979); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-419 (1975);

Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971). Just over six years after the original Act was passed, Congress in 1972 reaffirmed its commitment to equal employment opportunity for all citizens, by amending Title VII to, inter alia, strengthen the enforcement powers of the Equal Employment Opportunity Commission and extend the provisions of the Act to employees of state and local governments. 86 Stat. 103, Sec. 701(f), 42 U.S.C. §2000e.

Explaining the need for these amendments, the House Report relied on a 1969 U.S. Commission on Civil Rights report[7] which found that "widespread discrimination against minorities exist[ed] in state and local government employment, and that the existence of this discrimination [was]

[7] U.S. Comm'n on Civil Rights, For All The People...By All The People, (1969)

perpetuated by the presence of both institutional and overt discriminatory practices." H.R. No. 238, 92d Cong., 1st Sess. (1971), reprinted in 1972 U.S. Code Cong. & Ad. News 2137, 2152.

The House Report further noted that this type of employment discrimination was "particularly acute and had the most deleterious effect," id. at 2153, since it was being practiced in the governmental activities that were "most visible to the minority communities (notably education, law enforcement, and the administration of justice)..." Id.

The Chairman of the Equal Employment Opportunity Commission voiced a similar concern in testimony before the House of Representatives regarding the proposed amendments, noting that the "failure of state and local agencies to accord equal employment to their employees is particularly distressing in light of the impor-

tance that these agencies play in the daily lives of the local communities...." Equal Employment Opportunities Enforcement Act of 1971, Hearings on S.2515, 2619, H.R. 1746 Before the Subcomm. on Labor of Senate Comm. on Labor & Public Welfare, 92d Cong. (1971).

Nowhere are these concerns more evident or troublesome than in the continuing and almost total exclusion of women and minorities from local protective service departments--agencies closely identified with the overall protection of the public, and therefore perhaps the most visible of all occupations.

B. Government Employment Practices, Such As Seniority-Based Lay-Off Plans, Cannot Be Allowed To Frustrate Efforts To Remedy Discrimination.[8]

1. The use of the "last hired-first fired" principle to reduce employment in times of economic recession has a disproportionate impact on minorities and women.

Despite the enactment of federal,

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[8] Amici recognize, of course, the immunity afforded bona fide seniority plans under §703(h) of Title VII by this Court's ruling in Teamsters v. United States, 431 U.S. 324 (1977). At issue in this case, however, is not the lawfulness, under Title VII, of the seniority system of the City of Memphis fire department, but rather the appropriateness, under Title VII remedial principles, of relief which implicates a seniority plan. It is in this context only that amici urge a temporary restructuring of the "last hired-first fired" principle.

state, and local statutes and presidential orders which prohibit discrimination in employment,[9] equal employment opportunity remains an unrealized goal for many of this country's minority and women paid workers. For these people, serious barriers to their entrance into and continued participation in the paid job market continue to exist. Significant among these is the "last hired, first fired" practice for structuring layoffs, which has disproportionately affected minorities and women, particularly during our nation's most recent economic troubles. As the

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[9] See, e.g., 42 U.S.C.A. §1981 (West 1981); 42 U.S.C.A. §1983 (West 1981); Title VI, §601 of the Civil Rights Act of 1964, 42 U.S.C.A. §2000d (West 1981); Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C.A. §2000e et. seq. (West 1981); Exec. Order 11246, 30 Fed.Reg. 12319 (1965), as amended by Exec. Order 11375, 32 Fed. Reg. 14303 (1976); Public Works Employment Act of 1977, 42 U.S.C.A. §6705(f)(2)(West 1983).

United States Commission on Civil Rights pointed out in its 1977 Report Last Hired, First Fired: Layoffs and Civil Rights 1, (1977) [hereinafter cited as Last Hired, First Fired]:

> The long and extensive use of this policy by employers is one reason why income remains consistently lower and unemployment rates higher for these groups than for the labor force as a whole.

See Point I, supra.

Review of the impact of the 1974-75 recession on the employment status of minority and women workers highlights the devastating effects which can result from such layoffs. Between the end of 1973 and mid-year 1975, the unemployment rate for adult women rose steadily from 5.9% to 8.5%. Last Hired, First Fired at 10. Jobless rates reached 14.3% for non-whites, and 12.4% for Hispanic workers by mid-1975, as compared to 8.2% for white workers generally. Id.

Unemployment resulting from layoffs during that time period rose most sharply in those blue collar occupations where minority employees were most likely to be concentrated. Id. While the concentration of women workers in trade and services industries cushioned the impact of layoffs for women employees overall,[10] nonetheless, women who had broken into traditionally male jobs such as the assembly line of automobile plants or as patrol officers on police forces, were heavily affected by job loss. Id. Moreover, in some industries where minorities represented only 10-12% of the workforce, they accounted for 60-70% of those workers laid off in 1974. Id. at 24-25.

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[10] Cyclical changes in employment rates are generally less dramatic in trade and services than in goods-producing industries. Last Hired, First Fired at 11.

The impact of layoffs on government employees has been no less severe. For example, in mid-1975, the New York City Police Department laid off 371 of its 680 female police officers, out of a total force of almost 26,000. Id. Over half of all Hispanic workers in New York City lost their jobs between 1974 and 1975. Id. More recently, minority workers have accounted for 2335 of the 2944 layoffs of public sector employees ordered in Detroit between 1980-82. Bureau of National Affairs, Layoffs, Rifs, and EEO in the Public Sector: A BNA Special Report

23 (February 1982).[11/]

In April 1975, the United States Department of Labor reported that "recently hired workers, including many women and minority

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11/ Federal employees have fared no better. In 1981, 11,845 employees of the Federal government were laid off because of budget cuts. Bureau of National Affairs, Layoffs, Rifs, and EEO In The Public Sector: A BNA Special Report 5 (February 1982). These layoffs were 50% higher for minority employees than non-minority employees. Id. Among administrative employees, women were laid off at a rate 61% greater than men; minority workers in administrative positions experienced layoffs at a rate 3.5 times the average rate. Id. In the first two quarters of 1982, 5321 federal employees were laid off; nearly 63% of these laid off employees were women, and women and minority men together comprised nearly 80% of the layoffs. Summary of Task Force RIF Survey, Quarter 1 and Quarter 2 Fiscal Year 1982. (Federal Government Service Task Force). In the third quarter of 1982, 1393 federal employees were laid off, 50.6% of whom were women. The combined percentage of women and minorities laid off was 70.9%. Reduction In Force Survey Third Quarter Fiscal Year 1982 (Federal Government Service Task Force).

group members, have become early casualties of the economic downturn." Last Hired, First Fired at 10. Statistics reflecting the most recent federal layoffs, supra n. 11, demonstrate that the effects of the current recessionary cycle on the employment patterns of women and minorities are similarly disproportionate and injurious. Clearly, if affirmative measures designed to counteract these results are not instituted and adopted, "the opportunties [for women and minorities] laboriously created in the 70's may be destroyed during hard times in the 80's." U.S. Comm'n on Civil Rights, Affirmative Action In the 1980's: Dismantling The Process of Discrimination 36 (1981) [hereinafter cited as Affirmative Action].

Strict adherence to the last hired, first fired policy of layoffs "locks in" the effects of past discrimination by

continuing the advantage white males gained in employment as a direct result of minimal or no competition from women and minorities in the past.

2. Courts must be free to impose affirmative color-conscious or gender-conscious remedies if they are to fully effectuate the broad public policy against employment discrimination.

In deciding that under §706(g) the provision of retroactive seniority was "generally appropriate" as a remedy for hiring discrimination, this Court carefully considered the effect of an affirmative remedy on incumbent employees. Franks v. Bowman Transportation Co., 424 U.S. 747, 799 (1976). It found "untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected." 424 U.S. at 755. The Court recognized that retroactive seniority could affect the expectations and prospects of other employees,

but concluded that the importance of the remedy was paramount. 424 U.S. at 777-78.

The result of the remedy approved in Franks is the possibility that some white male workers who have been on the job for some time may find themselves, in hard times, losing economic benefits, or even being laid off, as a result of seniority-based relief ordered.

In the instant case, the effect of the district court's order on the department's seniority system was minor. No black firefighter with less seniority than a white firefighter retained his job while the white firefighter was laid off. Brief of Petitioners Memphis Fire Department at A4. Approximately 29 white firefighters were bumped to a lower position where minority firefighters with the same amount of seniority were not. Id. at A5-9.

But, the fact that some individual white males may be disadvantaged by a

court-ordered temporary bypass of seniority in times of layoffs should not preclude a court from authorizing such affirmative relief. For this Court to allow its determination of an appropriate remedy to be governed by the expectations of individual white male firefighters is to ignore the overall fairness of the plan, and the fact that affirmative measures "often produce changes in our institutions that are beneficial to everyone, including white males." Affirmative Action at 36.

Nor should this Court be troubled by assertions of "reverse discrimination" by opponents of such affirmative remedies. Such charges are mere smokescreens designed to undermine full and effective enforcement of congressional intent to end race and sex discrimination in employment: "[T]he charge of 'reverse discrimination', in essence, equates efforts to dismantle the process of discrimination with that process

itself. Such an equation is profoundly and fundamentally incorrect." Affirmative Action at 41.

Adherents of color-blind or gender-neutral solutions to discrimination "[ignore] the context in which the problem of inequality has persisted in this country.. .." Wright, Color-Blind Theories and Color Conscious Remedies, 47 U. Chi. L. Rev. 213, 214 (1980)(hereinafter Wright). Discrimination is "an interlocking process involving the attitudes and actions of individuals and the organizations and social structures that guide individual behavior." Affirmative Action at 13. Discrimination in employment simply cannot be equated solely with individual prejudice or expressions of bias, for when the forces of individual attitudes and actions, in combination with those of organizations and relevant social structures "are at work anti-discrimination remedies that insist

on 'color-blindness' and 'gender-neutrality' are insufficient." Id. at 2.

Moreover, it is clear that Congress, in enacting anti-discrimination legislation has rejected a "color-blind" or "gender-neutral" theory of government, and directed government to employ its power to eradicate it. As Judge Skelly Wright has emphatically remarked, "to call such legislation 'color-blind' is a meaningless abstraction. Legislation against invidious discrimination helps one race and not the other because one race and not the other needs such help." Wright at 220-21.

Decisions of this Court demonstrate its sensitivity to and agreement with the principles discussed above. As Justice Blackmun stated in his opinion in Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 407 (1978), "[i]n order to get beyond racism, we must first take account of race....And in order to treat persons equally, we must treat

them differently. We cannot--we dare not--let the equal protection clause perpetuate racial supremacy." Likewise, in United Steelworkers of America v. Weber, 443 U.S. 193 (1979), Justice Brennan refused to adopt a literal interpretation of §§703(a) and (d) of Title VII, which would have necessarily prohibited all race-conscious affirmative actions plans:

> The prohibition against racial discrimination in §§703(a) and (d) of Title VII must therefore be read against the background of the legislative history of Title VII and the historical context from which the Act arose...Examination of those sources makes clear that an interpretation of the sections that forbade all race-conscious affirmative action 'would bring about an end completely at variance with the purpose of the statute' and must be rejected...(citations omitted)

See also Fullilove v. Klutznick, 448 U.S. 448 (1980)(upholding as constitutional a provision of the Public Works Employment Act of 1977 that required state or local governments to use 10% of federal funds

granted for public works contracts to procure services or supplies from minority-owned or controlled businesses).

In the difficult economic circumstances we now face, the teachings of this Court's cases on the importance of remedying discrimination must not be forgotten.

> In this charged atmosphere, there is a strong temptation to view affirmative action as pitting the rights of minorities and women against white males in a battle over diminishing resources. The challenge, however, is to maintain, indeed, to advance our commitment to equality without asserting one equity over another.

Affirmative Action at 6.

POINT III

THE DISTRICT COURT'S ORDER WAS NOT AN ABUSE OF DISCRETION AND SHOULD BE UPHELD

A. Equitable Relief Will Be Disturbed Only If It Constitutes An Abuse Of Discretion By the Lower Court

This Court has made clear that appellate review of the issuance of equitable relief is limited to determination of whether the district court abused its discretion, and will be disturbed only if evidence is insufficient to support the court's action. Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R. Co., 363 U.S. 528, 535 (1960); Albemarle Paper Co. v. Moody, 422 U.S. 405, 446 (1975)(Rehnquist, J. concurring). "In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow." Lemon v. Kurtzman, 411 U.S. 192, 200 (1973); accord Swann v.

Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 15 (1971); International Salt Co. v. United States, 332 U.S. 392, 400-01 (1947).

Basic tenets of equity require a sensitive weighing of practicalities and balancing of public and private interests. As this Court has often noted:

> The essence of equity jurisdiction has been the power of the chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between public and private needs as well as between competing private claims.

Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. at 15, quoting Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944). See also Lemon v. Kurtzman, 411 U.S. at 200.

Subsequent modification of equitable relief requires broad discretion. System Fed'n No. 91, Ry. Emp. Dept. v. Wright, 364

U.S. 642, 647-48 (1961); cf. Browder v. Director, Ill. Dept. of Corrections, 434 U.S. 257, 263 n.7 (1978) (appellate review under Fed. R. Civ. P. 60(b)).

Because district judges are "uniquely situated...to appraise the societal forces at work in the communities where they sit," Columbus Bd. of Ed. v. Penick, 443 U.S. 449, 470 (1979)(Stewart, J., concurring), appellate review of equitable relief also requires deference to the judgment of the district court. See, e.g., Franks v. Bowman Transportation Co., Inc., 424 U.S. 747, 779-80 (1976); Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. at 12. In addition, the district judge has the unique experience of having managed the litigation in the past. See, e.g., Brown v. Board of Ed., 349 U.S. 294, 299 (1955).

Consistent with these principles of equity, the district courts must necessarily

retain flexibility to effectively address the varied situations which they confront. The rules governing eradication of race and sex discrimination should not be rigid and absolute. The district courts must not be deprived of the capacity to employ practical wisdom in fashioning remedies. The district court's order in this case was wholly appropriate and within the sound discretion of the court, and therefore should be upheld.

B. The District Court's Order Was Grounded Upon Sufficient Evidence of Discrimination And Therefore Was Not An Abuse of Discretion

The evidence of discrimination in the Memphis Fire Department contained in the record before the district court in the instant case was a sufficient basis for the district court's injunction. For example, between 1950 and 1976, the fire department hired only 94 black firefighters as compared to 1683 white firefighters. Between 1969 and 1975 only

7 black firefighters received promotions as compared to 386 white firefighters. In 1979, blacks constituted only two out of 25 administrative personnel, 6 out of 26 apparatus maintenance workers, 7 of 89 ambulance service personnel, 8 of 37 fire prevention workers and 3 of 50 communications workers. There were no black employees in the training and water or air mask service categories. Eight of the thirteen material service workers were black. Stotts v. Memphis Fire Department, 679 F.2d 541, 550-51 n.5 (6th Cir. 1982).

In fact, the evidence was so striking that both the district court and the court of appeals commented on it. The district court, when modifying the 1980 consent decree observed:

> While the agreement does not admit discrimination, it would be naive not to realize

> that the Fire Department of this City was very discriminatory towards black people for years, and it wasn't corrected properly until the Consent Decree was entered into this case.
>
> It is true that this Court never had hearings and made findings, but I could take judicial notice of that from the figures that are in the record of this Court.

Petition For a Writ of Certiorari at A73. Indeed, the court thought the history of discrimination so apparent that it was compelled to note "that the present situation resulted from prior discrimination, which is obvious." Id. at A76.

The Sixth Circuit, reviewing the district court's ruling found "[t]he statistics contained in this record represent a very strong prima facie case of employment discrimination." Stotts v. Memphis Fire Dept., 679 F.2d at 550-51 n.5. Examining the statistics included in the record, the court noted a revealing sign of purposeful dis-

crimination in hiring, that "[i]n the spring of 1981, blacks constituted only 11 percent of the Memphis Fire Department. Approximately 35 percent of the City of Memphis is black." Id.

Faced with similar statistical disparities, other courts of appeals have endorsed similar affirmative relief through consent decrees to overcome the effects of past discrimination. See, e.g., United States v. City of Miami, Fla., 614 F.2d 1322 (5th Cir. 1980), mod. in part on other grounds, 644 F.2d 435 (5th Cir. 1981)(approval of consent decree affording affirmative relief based on statistical disparities in racial composition); United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980)(approval of consent decree affording affirmative action based on statistical disparities in racial composition).

C. The District Court, Pursuant To Its Duty To Enforce The Decree And Its Authority To Modify It In Light Of Changed Circumstances, Did Not Abuse Its Broad Equitable Powers

The lower court was confronted with a situation, engendered by the Mayor's proposed layoffs, that would have significantly undermined the consent decrees. Both the goals of the 1974 and 1980 consent decrees, approved by the court, were explicit:

> The City, therefore agrees to undertake as its long term goal in this decree, subject to the availability of qualified applicants, the goal of achieving throughout the workforce proportions of black and female employees in each job classification, approximating their respective proportions in the civilian labor force.

Stotts v. Memphis Fire Dept., 679 F.2d at 571. The 1980 decree was intended to parallel and supplement the 1974 decree. Id. at 548. The 1980 decree underscored and reaffirmed the goal of the 1974 decree particularly as it applied to representa-

tion of black citizens: "the goal shall be to raise the black representation in each job classification on the fire department to levels approximating the black proportion of civilian labor in Shelby County." Id. at 576.

The goal of the 1974 and 1980 consent decrees had not been accomplished when the Mayor issued his order regarding layoffs. The effect of the Mayor's proposed layoff policy on the ongoing goal of increasing the number of minorities in the department would have been drastic: "fifty-five percent of all minority Lieutenants and 46% of all minority Drivers would either have been laid off or demoted had the layoffs occurred."[12/] Id. at 549-50.

The lower court was under an obligation

12/ In addition to eradicating the progress made pursuant to the consent decrees, the City's plan had the potential for perpetuating discrimination in other city agencies by taking into account, in determining seniority, an employee's prior service in another agency.

to assure implementation of the goals of the consent decrees to increase the percentage of black employees in the fire department and to alleviate the effect of past discriminatory policies, and therefore expressly retained jurisdiction in the decree. According to Section 17 of the 1980 decree, "The Court retains jurisdiction of this action for such further orders as may be necessary or appropriate to effectuate the purposes of this decree." Id. at 578.

As fully discussed above, the Mayor's proposal not only would have halted progress towards achieving that goal, but also would have sanctioned backsliding, thereby eliminating much of the progress already made. In view of this probable result, the district court's order was necessary to slow any backward movement that might occur. See U.S. v. Armour Co., 402 U.S. 673 (1981).

Further, there is no question that the district court had inherent power to modify its equitable relief to adapt to new or changed circumstances. United States v. United Shoe Corp., 391 U.S. 244, 251 (1968); System Fed. No. 91, Ry. Emp. Dept. v. Wright, 364 U.S. 642, 647-48 (1961). The sudden layoffs--indeed, the first in the City's history--which were to occur in Memphis within several years after the signing of the remedial consent decree, posed an unforeseen threat to the ongoing remedy. As discussed above, had the layoffs been permitted, substantial eradication of all progress under the decree easily could have resulted without a modification of the remedial orders.

In these circumstances, modification of the prior consent decree was appropriate and necessary in order to prevent the substantial undoing of the remedy. Brown v. Neeb, 644 F.2d 551, 560 (6th Cir. 1981); Perrotte v. Percy, 489 F.Supp. 212, 214

(E.D. Wisc. 1980); Bolden v. Pennsylvania State Police, 73 F.R.D. 370, 372 (E.D. Pa. 1976), aff'd, 578 F.2d 912 (3d Cir. 1978).

The district court's decision represents that "special blend of what is necessary, what is fair, and what is workable," Lemon v. Kurtzman, 411 U.S. 192, 200 (1973), that characterizes equitable remedies. Thus, the order did not prohibit layoffs of sworn personnel altogether. Cf. Schaefer v. Tannian, 538 F.2d 1234 (6th Cir. 1976)(district court improperly enjoined layoff of male police officers; injunction against layoff of female officers was proper). It did not ban the layoff of all minority firefighters. The order did not require any additional measures of affirmative action, or require that white firefighters be replaced by new minority hirees. It merely sought to preserve the remedial status quo achieved through the consent decrees in the face of an unexpected fiscal exigency, accord,

Bridgeport Guardians, Inc. v. Members of the Bridgeport C.S. Comm'n, 482 F.2d 1333, 1341 (2d Cir. 1973); Detroit Police Officers Ass'n v. Young, 608 F.2d 671, 696 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981), which threatened to frustrate the progress made under the consent decrees. It did not overbear "the interests of state and local authorities in managing their own affairs..." Milliken v. Bradley, 433 U.S. 267, 281 (1977).

The district court's reasonable modification of the consent decrees is not invalid simply because it involved suspending the operation of the city's last-hired, first-fired layoff proposal. The mere existence of a seniority-based layoff plan cannot diminish "the scope of a district court's equitable powers to remedy past wrongs....for breadth and flexibility are inherent in equitable remedies." Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971). Nor is the scope of

the remedial power under §706(g) of Title VII, 42 U.S.C.A §2000e-5(g)(West 1981), limited or qualified by the Congressional policy expressed in §703(h) of Title VII, 42 U.S.C.A. §2000e-2(h)(West 1981), of protecting bona fide seniority systems from attack as discriminatory. Franks v. Bowman Transportation Co., 424 U.S. 747, 758-59 (1976).

In Franks, this Court made clear that, in cases dealing with seniority systems, there is a significant "difference between a remedy issue and a violation issue," United Air Lines, Inc. v. Evans, 431 U.S. 553, 559 (1977). The instant case does not challenge the Memphis seniority-based plan as discriminatory, clearly distinguishing this case from the situation presented in Teamsters v. United States, 431 U.S. 324 (1977). Respondents, as well as the lower courts, focused exclusively on preserving the effectiveness of the remedy for the

initial violation, discriminatory hiring of minorities and women. See, Franks, 424 U.S. at 758.

CONCLUSION

For the reasons stated above, amici respectfully submit that the judgment below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

Supreme Court, U.S.
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OCTOBER TERM, 1983

FIREFIGHTERS LOCAL UNION NO. 1784
Petitioner,

v.

CARL W. STOTTS, et al.,
Respondents,

MEMPHIS FIRE DEPARTMENT, et al.,
Petitioners,

v.

CARL W. STOTTS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE OFFICERS FOR JUSTICE; INTERNATIONAL ASSOCIATION OF BLACK FIREFIGHTERS—SAN FRANCISCO CHAPTER; THE BLACK AGENDA COUNCIL; THE ASSOCIATION OF NORTHERN CALIFORNIA BLACK WOMEN LAWYERS; THE WILLIAM HASTIE LAWYERS ASSOCIATION; THE CHARLES HOUSTON BAR ASSOCIATION; THE KAPPA ALPHA PSI FRATERNITY; BLACK WOMEN ORGANIZED FOR POLITICAL ACTION; THE WILEY MANUEL LAW FOUNDATION; THE NATIONAL BAR ASSOCIATION; AND THE CALIFORNIA ASSOCIATION OF BLACK LAWYERS AS AMICI CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FIREFIGHTERS LOCAL UNION NO. 1784
Petitioner,

v.

CARL W. STOTTS, et al.,
Respondents.

MEMPHIS FIRE DEPARTMENT, et al.,
Petitioners,

v.

CARL W. STOTTS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE OFFICERS FOR JUSTICE; INTERNATIONAL ASSOCIATION OF BLACK FIREFIGHTERS—SAN FRANCISCO CHAPTER; THE BLACK AGENDA COUNCIL; THE ASSOCIATION OF NORTHERN CALIFORNIA BLACK WOMEN LAWYERS; THE WILLIAM HASTIE LAWYERS ASSOCIATION; THE CHARLES HOUSTON BAR ASSOCIATION; THE KAPPA ALPHA PSI FRATERNITY; BLACK WOMEN ORGANIZED FOR POLITICAL ACTION; THE WILEY MANUEL LAW FOUNDATION; THE NATIONAL BAR ASSOCIATION; AND THE CALIFORNIA ASSOCIATION OF BLACK LAWYERS AS AMICI CURIAE

IN SUPPORT OF RESPONDENTS

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 679 F.2d 541 (1982).

JURISDICTION

The jurisdiction of this Court is pursuant to 28 U.S.C. § 1254 (1). The Court of Appeal's judgment was entered on May 7, 1982. A petition for a Writ of Certiorari was filed on August 4, 1982 and was granted on June 6, 1983.

CONSENT FOR FILING

This amici curiae brief is being filed with the consent of the parties. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

INTEREST OF AMICI CURIAE

The common factor linking all amici in this brief is their strong commitment to the protection and advancement of the civil rights of minorities. The instant case involves a District Court's exercise of discretion to prevent institutionalization of past discriminatory employment practices. Amici believe that this appeal is moot, but in the event that the Court reaches the merits, it is imperative that it affirm the District Court's authority to modify the consent decrees in the way it did to prevent the seniority system from eradicating an affirmative action plan. In this time of deep recession and decreasing economic resources, black Americans, as well as other minority groups, are already experiencing a disproportionately high level of unemployment and economic dispair. These groups cannot afford to undergo, and indeed they should not be required to undergo, layoffs which would not only eliminate recently acquired civil rights gains, but also would reinstate the discriminatory status quo ante. Hence, amici's interest in the outcome of this case is substantial.

Officers for Justice is an organization comprised of minority members of the San Francisco Police Department. It was formed to address the issue of minority underrepresentation in the San Francisco Police Department and to combat discrimination aimed at those minorities who are members of the

police force. The organization has been involved in landmark litigation aimed at desegregating the San Francisco Police Department. Specifically, it has itself obtained a consent decree providing for affirmative action in the hiring and promotion of police officers in San Francisco. The preservation of the remedial impact of consent decrees designed to eliminate the present effects of past discrimination is of continuing and vital concern to this organization.

The International Association of Black Firefighters—San Francisco Chapter—is an organization of black professional firefighters which recruits blacks into the fire department, assists them in achieving promotions within the department, and makes fire services more relevant to the needs and aspiration of blacks and other minority citizens within San Francisco.

The Black Agenda Council, established in 1982, is a San Francisco network of elected and appointed officials representing more than 30 different black organizations. The Council is concerned with all issues affecting blacks in San Francisco and across the country. It regards the issue of black employment to be of paramount concern.

The Association of Northern California Black Women Lawyers represents the interests of black women lawyers. The Association is vitally concerned with the advancement of all minority Americans.

The William Hastie Lawyers Association, an organization of San Francisco-based black attorneys, includes equal employment opportunities for black Americans as one of its primary goals. Named after the late Judge William Hastie, the bar association is actively involved in protecting the civil rights of minorities.

The Charles Houston Bar Association, the oldest association of black attorneys in Northern California, was founded in 1955. The Association has filed a number of amici briefs before this Court on a variety of issues affecting the legal rights of the black community. Named after one of the most distinguished deans of the Howard University School of Law, the Association

strives to use the talents of black attorneys to advance the general interests of black Americans and to ensure that equal justice is a reality for them rather than an unfulfilled dream.

Kappa Alpha Psi Fraternity is an organization of some 80,000 black Americans concerned with all aspects of minority affairs in this country. Founded in 1911 it has more than 500 Chapters throughout the nation and it has been long active in struggles aimed at enhancing the lot (economic and otherwise) of black Americans. Kappa Alpha Psi fervently believes that the future of consent decrees, designed to alleviate the effects of past discrimination, is of critical importance to its membership and to all black Americans.

Black Women Organized for Political Action is a group of 800 women who advocate for progressive change for the betterment of black people in this society. Since 1970, it has been actively involved in issues of vital interest to the black community including employment discrimination.

The Wiley Manuel Law Foundation was founded in 1982 for the purpose of addressing legal issues of concern to the black community. The elimination of employment discrimination is an issue which the Foundation views as critical to black Americans.

The National Bar Association, founded in 1925, is a professional membership organization which represents more than 10,000 black attorneys, judges and law students in the United States. Its purposes include achieving equal opportunities for minorities in the legal profession and protecting the civil and political rights of all citizens. The Association has a particular interest in this case because of its belief in the importance of affirmative action as a means of solving America's racial problems.

The California Association of Black Lawyers consists of seven affiliates throughout California and represents the majority of black lawyers in the State. Among the purposes of the Association is the vigorous defense of voiceless black people. The Association is also acutely interested in ensuring that the laws of this nation are enforced so as to guarantee that all remnants of past discrimination are eradicated.

Amici's collective involvement in efforts to ensure equal employment opportunity for minority Americans and their belief that the District Court's modification of the consent decrees herein was an essential step in the process of realizing this goal has prompted this brief in support of Respondents.

STATEMENT OF THE CASE

In 1974, the United States Department of Justice commenced an action against the City of Memphis (City) under Title VII, 42 U.S.C. § 2000e et. seq., 42 U.S.C. § 1981, the Fourteenth Amendment and the State and Local Fiscal Assistance Act of 1972, 31 U.S.C § 1221 et. seq. alleging that the Memphis Fire Department (Fire Department) and various other City agencies discriminated in their hirings and promotions. Although it originally denied the allegations, the City later agreed in 1974 to settle the litigation by a consent decree.

Carl W. Stotts, a black male employee of the Fire Department, on February 16, 1977, filed a class action lawsuit alleging that the Fire Department's hiring and promotion policies violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000a, et. seq. and 42 U.S.C. § 1981 and § 1983. The complaint accused the Fire Department of maintaining racially discriminatory hiring and promotional practices. Fred Jones, a black person, in 1979 also filed an action against the City alleging that the Fire Department had denied him a promotion solely because of his race. The *Jones* and *Stotts* cases were consolidated and set for trial.

In 1980 the parties entered into a consent decree which was approved by the District Court. The expressed purpose of the decree was to remedy the effects of past discriminatory hiring and promotional practices of the Fire Department as they impacted blacks. Jurisdiction was expressly retained by the District Court to effectuate the purpose of the decree.

An unanticipated economic crisis was experienced by the City in April 1981, which required layoffs and demotions in various City departments. The layoffs and demotions were to be

based on strict seniority. Layoffs under the seniority system, as applied to the Fire Department, would have virtually eliminated the affirmative action gains under the 1974 and 1980 decrees.

On May 4, 1981, Respondents applied for and were granted a temporary order restraining the City from laying off or reducing in rank any minority employee in the Fire Department. An evidentiary hearing was held by the District Court, and the City was ordered not to implement any layoff policy based upon seniority if such policy would decrease the percentage of blacks in several job classifications in the Fire Department. The City later proposed and the District Court approved layoffs and demotions that included a proportionate number of blacks and whites. Both the City and the Union appealed; however, the United States Court of Appeals for the Sixth Circuit affirmed the District Court's modification of the consent decree to enforce the stated purpose of maintaining black representation in the Fire Department. By November 1981, all laid off employees were reemployed by the Fire Department.

QUESTION PRESENTED

Whether a District Court abuses its discretion by modifying a consent decree to prevent proposed layoffs and demotions of minority firemen in order to preserve the purpose of an original consent decree designed to eliminate the effects of past discrimination?

ARGUMENT

I

THIS APPEAL IS MOOT

A case is moot if "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *United States Parole Commission* v. *Geraghty*, 445 U.S. 388 (1980), quoting *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969). See also, *Murphy* v. *Hunt*, 455 U.S. 478 (1982). In

Weinstein v. *Bradford*, 423 U.S. 147, 149 (1975), the Court recognized that if a case is "capable of repetition, yet evading review" it may not be moot. But, according to the Court, there must be a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining parties. *Weinstein*, *supra*, at 149. That level of probability is not present in this case.

On this appeal, Petitioners argue that the District Court's modification of its original consent decree infringed upon their rights under the seniority system by causing layoffs in 1981 in a manner inconsistent with the established seniority system. Subsequently, all laid off employees were reemployed by the Fire Department. Therefore, the issues presented by this appeal are no longer alive; and there is no evidence in the record to show that these employees are again likely to be laid off because of modifications of the consent decrees.

Petitioners' position is that the District Court's modification of the city-wide seniority policy not only required the City to layoff and reduce in rank white senior incumbent employees in order to maintain a racially balanced Fire Department, but also that this alteration of the seniority system was illegal and that they were entitled to have their jobs restored. This is precisely what has occurred. See *Defunis* v. *Odegaard*, 416 U.S. 312, 316-317 (1974). Since the District Court's order has been completely fulfilled, no party is currently suffering any adverse consequences from that order which was totally consistent with a trial court's role in managing consent decrees. Petitioners are now in essence requesting this Court to rule on a matter that is no longer of controversy.

A consent decree is a unique instrument that represents numerous hours of negotiations and concessions from all parties in an atmosphere of compromise. The District Court is in the unique position of evaluating the good faith of the parties, the incentives necessary to make parties comply with the terms of the consent decree and the most effective methods to modify a consent decree in light of changed circumstances. The District Court in the instant case exercised its discretion in light of all the evidence in a manner designed to best achieve the goals of

the consent decree. In effect, the District Court's modification ordered the City to maintain black representation in the Fire Department. The City, responding to the court's order, did just that. But in so doing, the City was able to find funds necessary to keep the black firefighters as well as the white firefighters, and therefore alleviate the necessity of laying off any firefighters. Consequently, the court's order has been carried out, the City has maintained its minority hiring and promotional levels and the City managed to do this without laying off any firefighters.

Given the important public interest in maintaining the integrity of consent decrees and encouraging settlement of Title VII lawsuits, there is no reason to overreach the facts of this case and decide an issue which is not squarely presented to this Court. *Cf. Sosna* v. *Iowa*, 419 U.S. 393 (1975).

II

COURT ENFORCEMENT OF AFFIRMATIVE ACTION IN TIMES OF SHRINKING ECONOMIC RESOURCES ENCOURAGES EMPLOYERS TO PROVIDE JOBS FOR MINORITIES AND NON-MINORITIES ALIKE.

It is important to note that after courts in Boston and Memphis preserved the integrity of affirmative action orders, through modifications that prevented the percentages of minorities from being reduced as the result of layoffs, members of both minority and non-minority groups were laid off. But, in both cities all minority and non-minority alike who had been laid off due to budgetary problems were rehired. This fact rendered the appeal in the *Boston Firefighters* case moot (*Boston Firefighters Union, Local 718* v. *Boston Chapter, NAACP*, ____ U.S. ____ 51 U.S.L.W. 4566 (5/16/83)) and should as previously argued render the appeal in this action likewise moot.

An important lesson is taught by the experiences in Boston and Memphis. That lesson is that when municipalities are forced to take seriously the notion that affirmative action goals cannot be abrogated by adverse economic circumstances, they

tend to find ways of employing everyone. When the judicial system, the ultimate protector of the rights of minority citizens, makes it clear that Title VII will be enforced to fully integrate the work force and will not be ignored in times of shrinking economic resources, society seemingly takes that instruction seriously and somehow is able to find enough money to hire everyone as demonstrated in Boston and now in Memphis. Thus, by rigorously enforcing Title VII, the courts help to ensure that the Congressional intent of opening up the work force for minority workers is carried out.

In *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), this Court eloquently stated the rationale for Title VII—a rationale which remains valid today:

> Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with "the plight of the Negro in our economy." 110 Cong. Rec. 6548 (remarks of Sen. Humphrey). Before 1964, blacks were largely relegated to "unskilled and semi-skilled jobs." *Id.*, at 6548 (remarks of Sen. Humphrey); *id.*, at 7204 (remarks of Sen. Clark); *id.*, at 7279-7280 (remarks of Sen. Kennedy). Because of automation the number of such jobs was rapidly decreasing. See 110 Cong. Rec., at 6548 (remarks of Sen. Humphrey); *id.*, at 7204 (remarks of Sen. Clark). As a consequence "the relative position of the Negro worker (was) steadily worsening. In 1947 the non-white unemployment rate was only 64 percent higher than the white rate; in 1962 it was 124 percent higher." *Id.*, at 6547 (remarks of Sen. Humphrey). See also *id.*, at 7204 (remarks of Sen. Clark). Congress considered this a serious social problem. *Id.* at 202.

Municipalities such as Boston and Memphis who enter into consent decrees to remedy the effects of past discrimination should not be given the opportunity to negate their obligations in the event of layoffs by employing seniority systems which destroy the effects of the consent decrees. If such practices are permitted then Title VII's relief is illusory at best. For, as the

Weber Court pointed out, "unless blacks (are) able to secure jobs which have a future" (Id. at 203) the integration of blacks into the mainstream of society will not be achieved:

> Accordingly, it was clear to Congress that "(t)he crux of the problem (was) to open employment opportunities for Negroes in occupations which have been traditionally closed to them." 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey), and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed. *Id.*, at 203.

Strong, firm, and unyielding adherence to the concept of full integration of the workforce and the workplace requires that courts be permitted to modify consent decrees in ways which do not result in the decimation of the advances made by minority people. To be sure, society is currently experiencing economic contraction. But, if this Court continues its strong support of the concepts embodied in Title VII and other anti-discrimination statutes by giving a clear signal to employers and the public at large, that members of minority groups will not bear a disproportionate burden in these times of economic hardship, cities like Memphis as well as other employers will find ways to incorporate minorities into the job market even in times of shrinking economic resources.

Finally, it should be noted that, in unilaterally selecting the job classifications in the Fire Department which would be affected by the layoffs, the City chose those classifications where minorities had recently made the most gains under the affirmative action provisions of the 1974 and 1980 decrees. *Stotts* v. *Memphis Fire Department*, 679 F.2d 541, 563 (1982). But, after the District Court held that the decrees could not be negated in this manner and that minorities would remain in the Fire Department, a means was found by the City to reemploy all the laid off workers. Without the modified consent decrees, it is highly unlikely the City would have been motivated to reemploy all of the laid off employees. Black firefighters undoubtedly would have remained laid off.

III

THE DISTRICT COURT HAD INHERENT AUTHORITY TO MODIFY THE ORIGINAL CONSENT DECREES.

A. The "Four Corners" Test Is Inapplicable In A Case Such As This Where The Proceeding In The Lower Court Was One To Modify The Consent Decree.

A trial court's authority to modify a consent decree upon a showing of changed circumstances has been repeatedly affirmed by this Court. *United States* v. *United Shoe Machinery*, 391 U.S. 244 (1968); *System Federation* v. *Wright*, 364 U.S. 642 (1961); *Chrysler Corporation* v. *United States*, 316 U.S. 556 (1942); *United States* v. *Swift & Co.*, 286 U.S. 106 (1932). This Court very early recognized that a court may modify a consent decree whenever changed circumstances have turned the decree into "an instrument of wrong." *Id.* at 115.

A consent decree is not to be read as "an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be." *Id.* at 115. Thus, a court may exercise discretion to modify the terms of a consent decree whenever a change of circumstances, "whether of law or fact" so warrants. *System Federation* v. *Wright, supra*, at 64.

Particularly where, as here, the District Court has expressly reserved the right to modify a consent decree, a showing that circumstances have risen that threaten to undermine the objectives of the consent decree is sufficient to withstand a challenge to the trial court's authority to modify the decree. *U.S.* v. *Swift, supra*, at 115. *See also Chrysler Corp., supra*, at 562; *Brown* v. *Neeb*, 644 F.2d 551, 557 (6th Cir. 1981).

The 1980 consent decree in the instant case had the stated purpose of remedying the adverse effects of past hiring and promotional practices. The decree expressly retained jurisdiction in the District Court "for such further orders as may be necessary or appropriate to effectuate the purposes of this decree." *Stotts* v. *Memphis Fire Department, supra*, at 548.

After a full evidentiary hearing, the District Court found that "the proposed layoffs would have a devastating and retrogressive effect on the affirmative action mandated in the 1974 and 1980 Decrees." *Stotts, supra*, at 563. These findings have not been challenged.

Under other similar circumstances, where a modification has been made after a full evidentiary hearing, this Court has stated "that the test to be applied in answering this question [whether trial court's modification was proper] is whether the change served to effectuate or to thwart the basic purpose of the original consent decree." *Chrysler Corporation, supra*, at 562 (citing *Swift*). In light of the express purposes of the 1974 and 1980 decrees, and the adverse impact the layoffs would have had on progress thereunder, modification clearly promoted the objectives of the original decrees. In other words, modification was required to prevent those decrees from being rendered meaningless.

In spite of authority requiring a determination of whether the purposes of a decree are affected by a modification, Petitioners assert that the District Court's modification constituted clear error because the court went outside the "four corners" of the consent decrees and improperly looked to the purposes of the decrees. Petitioners rely on *United States* v. *Armour & Co.*, 402 U.S. 673 (1971); *United States* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959); and *Hughes* v. *United States*, 342 U.S. 353 (1952), for the proposition that a decree itself "cannot be said to have a purpose." Such reliance, however, is badly misplaced because neither *Armour*, *Atlantic Refining*, nor *Hughes* involved, as this case does, a proceeding to modify a consent decree. Instead, those cases involved actions based on a claim that the *terms* of the decree had been violated. And, in those cases, this Court merely held that the construction of the decree urged by the Government in its attempt to prove a violation was inconsistent with the express terms of the consent decree.

Moreover, Petitioners' reliance on *Armour*, *Atlantic Refining*, and *Hughes* has already been foreclosed by this Court. In *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223 (1975), this Court explained that resort to the "four corners"

language occurred in *Armour*, *Atlantic Refining*, and *Hughes* only after the Government had urged a construction not supported by the language of the decree. *U.S.* v. *ITT Continental Baking Co.*, *supra* at 235-36. Here, however, the question is not whether a construction of the original decrees supports a violation, but whether modification was proper.

Furthermore, it is significant to note that all of the above cases, including *ITT Continental*, either expressly or implicitly stated that the Government might have been able to obtain the construction it sought if it had done precisely what the Respondents here did—sought modification of the consent decrees. Specifically, in *Armour*, in the paragraph immediately preceding the oft-quoted one, this Court stated that the Government's argument "might be a persuasive argument for modifying the original decree, after full litigation, on a claim that unforeseen circumstances now made additional relief desirable to prevent the evils aimed at by the original complaint." *U.S.* v. *Armour & Co.*, *supra* at 682 (footnote omitted). *Accord*, *ITT Continental*, *supra* at 233-34 n.8; *U.S.* v. *Atlantic Refining Co.*, *supra*, at 23; *Hughes* v. *U.S.*, *supra* at 357. Respondents in the present case followed the procedure approved by the Court in *ITT Continental*, *Armour*, *Atlantic Refining*, and *Hughes*. They properly alleged that changed circumstances required a modification. Accordingly, the District Court properly modified the decrees after an evidentiary hearing.

B. Failure To Modify The Decrees Would Have Permitted The Petitioners To Repudiate The Obligations Imposed Upon Them By The Consent Decrees.

When a city has undertaken, pursuant to a consent decree, to institute necessary steps to remedy disadvantages suffered by minorities as a result of past hiring and promotional practices, as the City of Memphis did, courts have held them to that obligation even in the face of asserted fiscal problems making compliance with the agreements difficult. Thus, in *Brown* v. *Neeb*, *supra*, the court rejected the City of Toledo's argument that it should be permitted to go through with proposed layoffs that would have significantly depleted the ranks of black and Hispanic firefighters in direct contravention of a consent decree

which imposed a duty on Toledo's Fire Department to attain certain ratios within five years. The *Brown* court reasoned that the object of the decree was to desegregate the fire department, and that the District Court had authority to prevent actions violative of Toledo's expressed commitment to that goal. *Brown* v. *Neeb*, *supra*, at 557. Similarly, in *Bolden* v. *Pennsylvania State Police*, 73 F.R.D. 370 (E.D. Pa. 1976), the court also rejected the argument that personnel reductions caused by a fiscal crisis would excuse the State Police from complying with affirmative action requirements agreed to in a consent decree. See also *Sarabia* v. *Toledo Police Patrolman's Association*, 601 F.2d 914 (6th Cir. 1979).

In the instant case, the City agreed to remedy the past hiring and promotion practices of its Fire Department. The original decrees embodied agreements between the parties that certain steps would be taken to improve minority representation in the Fire Department, including accelerated minority hiring. The decrees established a goal in this regard—i.e., minority representation in the department was to be increased until it approximated the level of minority representation in the City. The consent decrees were arrived at only after extensive negotiations, during which the City at no time demanded that the decrees include a provision that might excuse it from compliance in the event it experienced economic hardship. Nor did the City insist on a clause respecting layoffs. Rather, the City specifically promised that it would reach certain goals and would engage in certain hiring and promotion practices. Therefore, the District Court did not err in merely holding the City to its promise.

Strangely, the City now argues that the modification should not have been made because the *Respondents* failed to spell out what would happen in the event of layoffs. *Petitioners' Brief on the Merits*, at pp. 15-16. Even more strangely, the City asserts that the Respondents should have foreseen the layoffs, and should have insisted on a clause protecting the rights of the minorities hired under the consent decrees. Thus, Petitioners are contending that Respondents should have had foresight that the City itself did not have. This argument is without merit. For it is undisputed that the layoffs were unprecedented.

The real question here is whether the City should be held to fulfill the promises it made in the consent decrees. The City's commitment was made to increase minority representation in the Fire Department; and, just as it had begun to fulfill that commitment, it attempted to renege on it by asserting that a fiscal crisis existed. Nothing in the original consent decrees allowed repudiation of the City's obligations because of an asserted fiscal crisis. Furthermore, no provision limited the decrees to situations where the City is motivated by an intent to discriminate, or where there has been a finding of a violation of the decrees. Petitioners are in virtually the same position as the defendants were in *Swift*. And, in *United Shoe*, this Court stated that "*Swift* teaches that a decree may be changed upon an appropriate showing and it holds that it may *not* be changed in the interests of defendants if the purposes of the litigation as incorporated into the decree . . . have not been fully achieved." *U.S.* v. *United Shoe Machinery*, *supra*, at 248 (emphasis in original). Consistent with the teachings of *Swift*, this Court should not permit Petitioners to escape the obligations imposed by the consent decrees.

C. An Adjudication Of A Violation Of Law Was Not A Prerequisite To The District Court's Modification Of The Original Consent Decrees.

In no case where this Court has discussed the parameters of a District Court's authority to modify a consent decree on the grounds of changed circumstances has it imposed a requirement that an adjudication of a violation of law precede modification of the consent decree. The Petitioners do not, and cannot, point to such a case. In support of their argument that an adjudication of a violation of law is a prerequisite to a modification, the Petitioners rely on *Atlantic Refining* and *Hughes*. But, as demonstrated above, neither of those cases dealt with a District Court's authority to modify a consent decree.

Petitioners also cite *Fox* v. *United States Dept. of Housing*, 680 F.2d 315 (3d Cir. 1982), which did involve the propriety of a modification of a decree. In *Fox*, however, the parties sought modification in an area that was only collateral and peripheral to the primary obligation undertaken by the consent decree.

However, in the instant case the City agreed specifically to hire and promote minorities. Thus, the maintenance of black firefighters in the Fire Department goes to the very heart of this case, and the consent decrees could properly be modified to carry out those primary purposes. See *Brown* v. *Neeb*, *supra*, (Brown J., concurring) (court can modify a consent decree in light of changed circumstances if done to carry out the express purpose of a decree, even in absence of a determination of liability).

D. The District Court's Modification Of The Original Consent Decree Was Not Barred By Section 703(h) Of Title VII.

Contrary to Petitioners' arguments, this Court has not faced the issue of whether a bona fide seniority system can be modified to prevent erosion of affirmative action gains under a consent decree. However, the Court has unequivocally held that Section 703(h) of Title VII does not insulate seniority systems for all purposes. See *Franks* v. *Bowman Transportation Company*, 424 U.S. 747 (1976). In *Franks*, for example, the Court held that Section 703(h) was merely a definitional provision setting forth which employment practices are violations of Title VII and should not be read as a bar to relief otherwise appropriate under the Act. *Franks*, *supra*, at 758, 761-762. Following the principles set forward in *Franks*, this Court has repeatedly approved remedial modification of bona fide seniority systems. See *Teamsters* v. *United States*, 431 U.S. 324 (1977), and *Zipes* v. *Transworld Airlines*, 455 U.S. 385 (1982).

Consistent with the principles of *Franks*, the District Court's action below merely maintained affirmative action gains made under the consent decree—a goal which already had been agreed to by all parties. Additionally, the District Court had specifically retained jurisdiction of the case for further orders to effectuate the purposes of the decree. Rather than being in conflict with Title VII, the Court's action was consistent with the public interest of encouraging settlements and fulfilling the goals of settlement agreements.

IV

HAVING AN INTEGRATED FIRE DEPARTMENT SERVES AN IMPORTANT GOVERNMENT INTEREST WHICH OUTWEIGHS THE RIGID MAINTENANCE OF A SENIORITY SYSTEM.

A. Integrated Protective Services Serve An Important Governmental Interest.

Any reasonable comparison of the benefit to be derived from the creation of a racially balanced Fire Department in the City of Memphis with the enforcement of seniority rights results in the conclusion that the public benefit is by far the most overriding consideration. Desegregation of this country's major institutions is a national policy of the highest priority. *Franks* v. *Bowman Transportation Co., supra.* Public entities such as protective service agencies and departments are especially important arenas for desegregation because of the nature and necessity of the services they provide. For example, the Memphis Fire Department is responsible for protecting the property and lives of the *public.* If it is to be effective in that endeavor, it must be representative of all segments of the population which it serves. The level of respect and cooperation that the public affords any protective service agency is usually a function of the public's perception of that agency. This "truism" has been judicially recognized in previous cases and by analogy may be applied to the instant case. This point was also made in relation to police officers by the court in ***Bridgeport Guardians, Inc.*** v. ***Members of Bridgeport Civil Service Commission,*** 482 F.2d 1333, 1341 (2nd Cir. 1973), cert. denied, 421 U.S. 991 (1975) when it stated that:

> [P]erhaps, the most critical consideration in our view is that this is not a private employer and not simply an exercise in providing minorities with equal employment opportunities. This is a police department *and the visibility of the black patrolmen is a decided advantage for all segments of the public at a time when racial divisiveness is plaguing law enforcement* (emphasis added).

A few years later the court again in *Detroit Police Officers' Association* v. *Young*, 608 F.2d 671, 696 (6th Cir. 1979) cert. denied, 452 U.S. 938 (1981) explained the nature of the benefits to be derived from racially balanced protective service departments:

> The argument that police need more minority officers is not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather, it is that *effective crime prevention and solution depends heavily upon public support and cooperation which result only from public respect and confidence in the police.* In short the focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions (emphasis added).

It should be reiterated that the original consent decrees were designed to alleviate the massive racial imbalance in the Fire Department which was the result of discriminatory hiring practices. The layoffs threatened the objective of the original decrees—i.e., racial balance—and were not based upon criteria which considered the imbalance existing prior to the decrees.

B. Protective Service Employers Expectations Of Seniority Do Not Outweigh The Need For An Integrated Fire Department.

The fact that senior employees may have formed expectations concerning their seniority rights which went unfulfilled because of the District Court's action adds nothing to Petitioners' position. A similar argument was made and rejected in *Franks* v. *Bowman Transportation Co., Inc., supra.* There, an employer sought to avoid giving retroactive seniority to a class of discriminatees on the grounds that such relief would conflict with the economic interests of other employees. *Franks, supra,* at 773. This Court, rejected that argument:

> It is apparent that denial of seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would, if applied generally, frustrate the central "make whole" objective of Title VII. . . . We

find untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected. *Id.* at 774-75.

Here, Petitioners' vigorous argument that the District Court's modification of the consent decrees unduly interfered with the expectations of protective service employees is particularly unpersuasive given the fact that those expectations arose out of the discriminatory state of affairs which existed prior to 1974.[1] The court in *Baker* v. *City of Detroit*, 483 F.Supp. 930 (E.D. Mich. 1979), reached the same conclusion regarding an identical argument. There, white police officers challenged a voluntary affirmative action plan calling for realignment of seniority rights between white and minority officers. In rejecting the plaintiffs' claim that Detroit's action unduly interfered with their legitimate expectations, the court observed: "It is true that affirmative action upsets the expectations of white workers, *but such expectations are indeed tainted when they are based upon a legacy of discrimination.*" *Id.* at 1002 (emphasis added). The court went on to point out that white officers had received an unexpected "bonus" when the police department gave them unearned promotions in 1970 as part of the discriminatory conduct and it held that "[w]hite officers cannot reasonably complain when the Department, on a finding of past discrimination and operational need, decided to confer a 'bonus' on blacks in 1974 and subsequent years." *Id.*

Similarly, in the present case the Court of Appeals rejected the proposition that a consent decree which accelerated minority eligibility for promotions unduly interfered with the expectations of non-minorities. The Court of Appeals observed that "[a] simple reduction in the 'expectations' of non-minorities does not . . . necessarily make a consent decree unreasonable." *Stotts, supra*, at 556 and it went on to hold that the harm suffered by incumbent non-minority employees because of the promotional goal was deminimus:

---

[1] Even five years after the 1974 decree, the employment situation in the Fire Department for blacks was still deplorable. For example: "In 1979, blacks constituted between 33 and 37 percent of the Memphis population. However, the Fire Department was only 10 percent black." *Stotts, supra*, 679 F.2d at 550. The past hiring and promotional policies of the City caused this tremendous imbalance in the hiring and promotion of blacks. *Id.*

> Non-minorities allege that the 1980 Decree's 20% promotion goal unduly interferes with their expectation of promotion. It appears, however, that the expectation of non-minorities is based upon a pre-decree minority promotion ratio which presumptively would have been significantly higher had the City's employment practices been nondiscriminatory. The 1980 Decree eliminated only *a portion* of the promotional expectations of non-minorities which were presumptively based on the City's discriminatory promotional practices. *Id.* (emphasis in the original).

Here, just as the white Police Officers in *Baker*, the expectations of white Fire Department employees are based upon a pre-decree situation caused by discriminatory conduct and the lingering effects of that situation. To the extent that the District Court's limitation on layoffs interfered with those expectations, it did not adversely affect any legally protected interest of white employees. As the Court of Appeals for the Second Circuit observed in discussing Title VII, "[i]f relief . . . can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed." *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 663 (2nd Cir. 1971). Accord, *Franks*, *supra*, 424 U.S. at 775.

There is an important national policy served by not allowing seniority rights to overrule affirmative action efforts instituted to rid society of the historical evils of racial discrimination. Petitioners argue as if the seniority rights of white protective service employees in Memphis accrued in a vacuum. They assume, and invite this Court also to assume, that their seniority rights were accumulated in a racially-neutral fashion. From this false premise, they conclude that the purportedly "neutral" seniority rights of white protective service employees outweigh the public interest in desegregating the Memphis Fire Department.

This argument overlooks the fact that, *but* for the discriminatory hiring practices which triggered this litigation and *but for* the continuing effects of that past discrimination, the distribution of seniority rights between white and minority Fire Department employees would be far different from that in existence in 1981. For as the Court of Appeals observed in its opinion below:

> It is unfortunate that the City engaged in the employment practices which precipitated the decree. However, nonminorities benefitted from, practiced, and acquiesced in those practices. The 1980 Decree is a reasonable means to correct the adverse effects which minorities shouldered as a result of those employment practices. *Stotts*, *supra*, at 559.

One of the *most* significant advantages conferred upon Petitioners as a group was their preferential position on the seniority lists which they would not have attained but for discrimination against minorities. The minority firefighters currently employed by the City of Memphis were the "last hired" for the sole reason that because of discriminatory hiring practices no appreciable numbers of minorities were hired prior to 1974. Thus, the disparity in starting dates between white and minority Fire Department employees is nothing more than the mirror image of the discriminatory conditions which existed in 1974.

In view of the foregoing, any comparison of the benefits to be derived by white employees from enforcement of their seniority rights on the one hand and the public benefit in having racially balanced fire departments on the other must result in the conclusion that the public benefit is by far the overriding consideration.

Measured against these factors, the interests of protective service employees in enforcement of their seniority rights do not support the relief they seek. A program of layoffs based upon strict seniority would benefit only white firefighters because it would fulfill their expectations which are based upon the discriminatory conditions existing prior to the consent decrees, and it would frustrate the City's need for a racially balanced Fire Department.

V

CONCLUSION

Amici curiae respectfully urge this Court to uphold the fundamental principle that seniority rights may not be used to bar the modification of a consent decree to alleviate the effects of past discrimination that it was originally designed to accomplish.

Dated: October 14, 1983

Respectfully submitted,

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Nos. 82-206, 82-229

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MEMPHIS FIRE DEPARTMENT and FIREFIGHTERS LOCAL UNION NO. 1784,
Petitioners,

v.

CARL W. STOTTS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether in an employment discrimination case a federal district court has the remedial authority to modify a consent decree, silent in regard to layoffs, in such a manner that a bona fide seniority system calling for layoffs by reverse order of seniority is abrogated and replaced by a court-ordered quota directing that innocent employees be deprived of their jobs so that the jobs may be held by persons of a different race, where there has been no adjudication of racial discrimination by either the employer or the union in the operation of the seniority system, and where the court order benefits those who are not victims of any racial discrimination.

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF or Foundation) is a national nonprofit public interest law center that engages in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 200,000 members and supporters throughout the United States, including the State of Tennessee, whose interests the Foundation represents.

WLF participates in and devotes a substantial portion of its resources to cases relating to government regulations and constitutional law which involve the civil rights of citizens and small businessmen. WLF has appeared in the United States Supreme Court on many occasions as *amicus curiae*. Briefs *amicus curiae* of the Foundation have been filed with and accepted by this Court in such recent employment discrimination cases as *General Build-*

ing Contractors Association, Inc. v. Pennsylvania, 102 S.Ct. 3141 (1982); *United Steelworkers v. Weber*, 443 U.S. 193 (1979), *reh'g denied*, 444 U.S. 889 (1980); and *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979). Moreover, this same term, WLF moved and was granted permission to file an *amicus curiae* brief in *Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP, et al.*, No. 82-185, a case which presented questions virtually identical to those presented here.[1]

In the instant case, the Washington Legal Foundation seeks to advance the interests of its members and the public by urging this Court to reverse the decision of the United States Court of Appeals for the Sixth Circuit. By affirming the district court's modification of a consent decree, the Sixth Circuit has erroneously sanctioned "relief" measures which exceeded the proper scope of a federal court's remedial powers. Such "relief" measures included the suspension of a bona fide seniority system and the requirement that preferential treatment be given to minority employees in layoff situations based solely on their race, even though these individuals were *not* victims of past discrimination and there has been no adjudication of discrimination against either the employer or the union in the functioning of the City's seniority system. The district court clearly abused its discretion in granting relief which exceeded its equitable powers and contravened Title VII. Because it affirmed this clear abuse of discretion, the Sixth Circuit must be reversed.

The parties to this controversy are primarily concerned with the legality of the City's Layoff Policy. For this reason, the larger public interest issues—such as whether a federal court can order quota relief to aid nonvictims of racial discrimination—may not receive the full consider-

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[1] The questions presented in the *Boston Firefighters* case were never resolved as this Court vacated and remanded the case to the First Circuit in order to consider whether the controversy was moot. *See* 51 U.S.L.W. 4566 (May 16, 1983).

ation they deserve. Since its inception the Washington Legal Foundation has involved itself with these issues. WLF has a history of opposing both racial discrimination *and* racial quotas. Accordingly, the Washington Legal Foundation believes that its participation will assist this Court in better understanding these issues and in reaching the result that will best serve the public interest.

Both parties have consented to the filing of this *amicus curiae* brief in papers which have been filed with the Clerk of this Court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amicus* adopts by reference the Statement of the Case contained in the Petition for Certiorari at 2-5.

SUMMARY OF ARGUMENT

The Sixth Circuit erred in approving the modification of the 1980 Decree ordered by the district court which overrode the provisions of a neutral bona fide seniority system. The legislative history of Section 703(h) of Title VII indicates that Congress was especially concerned that suits brought under Title VII might impair the legitimate interests of incumbent employees. Accordingly, Congress extended immunity under the statute to bona fide seniority systems such as the one referred to in the City's Layoff Policy.

Moreover, an examination of the legislative history of Section 706(g) of Title VII convincingly demonstrates that Congress intended to outlaw quota relief and to limit the remedial power of federal courts to making "whole" actual victims of racial discrimination. Hence, the district court's modification of the 1980 Decree mandating racial layoff quotas, which benefitted minority employees who were not victims of discrimination at the expense of innocent nonminority employees, was unlawful.

Even if this Court were to conclude that Congress did not intend to limit the remedial powers of federal courts

in race discrimination cases by enacting Section 706(g), additional reasons exist for overturning the decision below. First, the district court exceeded the traditional equitable limitations on a court's remedial power by affording relief to individuals who had not suffered any injury. Second, the district court's modification of the consent decree exceeded the carefully negotiated terms of the decree. Finally, the district court's order is contrary to the public interest in that it will have the effect of fostering racial polarization in the workplace.

ARGUMENT

I. SECTION 703(h) OF TITLE VII IMMUNIZES BONA FIDE SENIORITY SYSTEMS SUCH AS THE ONE INCORPORATED INTO THE CITY'S LAYOFF POLICY FROM MODIFICATION IN A TITLE VII CASE

The respondents challenge the validity of the City's Layoff Policy. They claim that requiring layoffs by reverse order of seniority, although concededly carried out in a racially neutral manner, would nevertheless violate the public policy embodied in the 1980 Decree by "devastating" minority employment and thereby carrying forward the effect of the City's alleged prior acts of discrimination in its hiring and promotion policies. In this instance, the public policy under consideration is Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* However, Section 703(h) of Title VII specifically provides that: ". . . it shall not be an unlawful employment practice for an employer to apply . . . different terms, conditions, or privileges of employment pursuant to a bona fide seniority system. . . ." Hence, laying off an employee on the race neutral basis of seniority according to a bona fide seniority system is obviously a protected condition of employment and is not subject to challenge under Title VII as the legislative history of this section indicates.[2]

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[2] The Sixth Circuit, although affirming the district court, nevertheless found, contrary to the district court that the City's seniority system was bona fide.

The original House bill of the Act, H.R. 7152, did not contain any reference to seniority systems. When the House bill reached the floor of the Senate, however, the issue of seniority received extensive attention as Senators opposing the Civil Rights Act criticized the bill for appearing to abrogate existing seniority systems and the many benefits of employment that are based upon these systems. In response to this criticism, Senators Clark and Case, the bipartisan captains in charge of explaining Title VII, introduced three documents into the Congressional Record expressing the view that Title VII would not affect existing seniority systems. One of the documents, a memorandum prepared by the Justice Department, is particularly relevant to this case. It explained that:

> If . . . a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by Title VII. This would be true even in the case where, owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. 110 Cong. Rec. 7207 (1964).

This interpretation of the interaction of Title VII with the standard "last hired, first fired" principle of employment seniority was buttressed by Senator Clark's specific response to written questions posed by Senator Dirksen:

> Question: Would the same situation prevail in respect to promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? *Normally, labor contracts call for 'last hired, first fired.' If the last hired are Negroes, is the employer discriminatory if his contract requires that they be first fired and the remaining employees are white?*
>
> Answer. *Seniority rights are in no way affected by the bill. If under a 'last hired, first fired' agreement a Negro happens to be the 'last hired'; he can*

> *still be 'first fired' as long as it is done because of his status as 'last hired' and not because of his race.* 110 Cong. Rec. 7217 (1964) (emphasis added).

The legislative history of Section 703(h) has been analyzed in detail by this Court and will not be reiterated by *Amicus*. *See Franks v. Bowman Transportation Co.*, 424 U.S. 747, 759-61 (1976); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 350-355 (1976). Suffice it to say that this Court has consistently recognized that "the unmistakable purpose of section 703(h) was to make clear that routine application of a bona fide seniority system would not be unlawful under Title VII." *Id.* at 352. *See also United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982). These cases make it clear that the City's seniority system cannot be modified under Section 703(h) absent a finding that the seniority system was established for the purpose of discriminating against minorities or that the routine operation of the seniority system injures actual victims of racial discrimination who have been denied their rightful seniority because of racially discriminatory hiring practices.[3] In this case, neither situation obtains.

When viewed as a whole, the plain meaning of Section 703(h), its legislative history, and this Court's own pronouncements regarding Section 703(h), make it evident that Congress did not intend that a violation of the Act or its underlying public policy would occur whenever minorities are the first to be laid off because of their lack of seniority as determined by a bona fide seniority system.

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[3] The unmistakable focus of both *Teamsters*, 431 U.S. at 361, as well as *Franks v. Bowman Transportation Co.*, 424 U.S. at 773, was on allowing courts to take affirmative action on behalf of *the victims* of discriminatory practices. Although "[t]here is no indication in the legislative material that § 703(h) was intended to modify or restrict relief . . . once an illegal discrimination practice . . . is proved . . .," *Franks*, 424 U.S. at 761-62, one must still be a victim of racial discrimination in order to be afforded super-seniority relief. *Id.* at 762-70.

Accordingly, this Court must hold that the City's Layoff Policy providing for layoffs by reverse order of seniority is not contrary to public policy and consequently was not subject to modification by the district court.

II. THE DISTRICT COURT EXCEEDED ITS REMEDIAL AUTHORITY UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII of the Civil Right Act of 1964 empowers the courts, on a finding of unlawful employment discrimination, to provide complete equitable relief to individuals who have been discriminated against by their employers. Specifically, section 703(a) provides that:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge *any individual*, or otherwise to discriminate against *any individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive *any individual* of employment opportunities or otherwise adversely affect his status as an employee because of such *individual's* race, color, religion, sex or national origin (emphasis added).

In the recently decided case of *Connecticut v. Teal*, 457 U.S. 922, 926 (1982), this Court stressed that:

> The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole. Indeed, the entire statute and its legislative history are replete with references to protection for the individual employee. See, *e.g.*, §§ 703(a)(1)(b)(c). . . .

Because the unmistakable "focus" of Title VII is the protection of *individuals* who suffer employment discrimination, it logically follows that members of a minority group who have not suffered such discrimination are not entitled to Title VII's protection simply because of their membership in that group. This conclusion is fully supported by section 706(g) of Title VII which sets out the remedies that a court may order upon a finding of a violation of Section 703(a).

As originally enacted, Section 706(g) provided in pertinent part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . , the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without backpay. . . . No order of the court shall require . . . the hiring, reinstatement or promotion of an *individual* as an employee, or the payment to him of any back pay, if such *individual* . . . was refused employment or advancement, or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a) (emphasis added).

The last sentence of Section 706(g) states that even where there is a finding of employment discrimination in violation of Title VII, a court may not order relief that runs in favor of an individual who suffered adverse employment consequenecs for "any other reason than discrimination on account of race, color, religion, sex or national origin. . . ." The language could not be any clearer. Section 706(g) bars courts from issuing remedial orders that run in favor of individuals who may be members of a minority group but who have never themselves suffered employment discrimination by the actions of their employer. Thus, quota remedies, such as the type *sub judice*, are precisely the type of remedial orders barred by the

literal language of Section 706(g). The legislative history of this section reinforces this interpretation.

A. An Examination Of The Legislative History Of Section 706(g) Of The Civil Rights Act Of 1964 Demonstrates That Congress Intended To Bar Quota Relief Such As That Ordered By The District Court

H.R. 7152, the Kennedy Administration's civil rights bill, did not originally contain 706(g). The provision was added by the subcommittee of the House Judiciary Committee and first received extensive comment when the full Judiciary Committee's favorable report on H.R. 7152 was released. At that time, members opposed to Title VII issued a minority report asserting that the bill would impose "a not too subtle system of racism in-reverse." H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963) at 72, *reprinted in* 1964 U.S. Code Cong. & Ad. News 2391 at 2431.[4] These charges were rebutted early on by a statement of *Additional Views on H.R. 7152* that was issued by supporters of the bill:

> It must also be stressed that the [Equal Employment Opportunity] Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty . . . [T]he Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers or

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[4] It is important to emphasize that the battle lines were drawn early and remained clear throughout the legislative debate over Section 706(g). Opponents of Title VII consistently charged that 706(g) would be used by agencies of the federal government such as the Equal Employment Opportunity Commission (EEOC) and federal courts to require "quota remedies", i.e., remedies that would require employers to hire, promote or otherwise grant preferential treatment to a specified percentage of minorities based solely on the fact of their race. Supporters of Title VII just as consistently argued that nothing in the bill would permit any agency *or court* to give preferential treatment to minorities *qua* minorities. They successfully argued that Section 706(g) mandated only victim-specific remedies, *i.e.*, ones through which an actual victim of discrimination was "made whole."

> labor unions. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices.

Id. at 2516.

When H.R. 7152 reached the floor of the House express reference was made to the remedial powers of the federal courts to handle cases initiated by the EEOC. In the opening speech in support of Title VII's passage, Representative Celler, Chairman of the House Judiciary Committee and floor manager of the bill, responded to "unfair and unreasonable criticism" that the bill would infringe the rights of nonminorities by stating that:

> [T]he [Equal Employment Opportunity] Commission could seek redress in the federal courts, but it would be required to prove in the court that that particular employer involved had in fact discriminated against one or more of his employees because of race, religion or national origin. . . .
>
> No order could be entered against an employer except by a court, and after a full and fair hearing, and any such order would be subject to appeal as is true in all court cases.
>
> *Even then, the court could not order that any preference be given to any particular race, religion, or other group, but would be limited to ordering an end to discrimination.* 110 Cong. Rec. 1518 (1964) (emphasis added).

Representative Celler's views were echoed in equally strong terms by other proponents of Title VII. For example, Representative Minish declared that "no quota system will be set up," *id.* at 1600, and Representative Goodell, a major Republican backer of the Act, interrupted a colloquy between Representatives Dowdy and Ashmore in which they suggested that Title VII would require racially balanced unions, to state:

> As I understand the gentleman's position, I do not think it can go unchallenged. There is nothing here

> as a matter of legislative history that would require racial balancing. . . . *We are not talking about a union having to balance its membership or an employer having to balance the number of employees. There is no quota involved. It is a matter of an individual's rights having been violated,* charges having been brought, investigation carried out and conciliation having been attempted and then proof in court that there was discrimination and denial of rights on the basis of race or color. *Id.* at 2804-05 (emphasis added).

Following the House's passage of Title VII a memorandum was published by the bill's House Republican sponsors which described the bill that had just been passed. The memorandum stated in pertinent part:

> Upon conclusion of the trial, the federal court may enjoin an employer or labor organization from practicing further discrimination and may order the hiring or reinstatement of an employee or the acceptance or reinstatement of a union member. But, *Title VII does not permit the ordering of racial quotas in business and unions and does not permit interference with seniority rights of employees or union members. Id.* at 6566 (emphasis added).

After H.R. 7152 passed the House, the precise scope of Section 706(g) was again fully debated in the Senate. Senator Humphrey, the majority whip and one of the floor managers of the bill, was quick to challenge the notion advanced by opponents of Title VII that 706(g) would be used to require racial balancing: "The bill does not require that at all. If it did, I would vote against it." 110 Cong. Rec. 6001 (1964). He reiterated this later with express reference to the remedial powers of the courts: "[N]othing in the bill would permit any official or court to require any employer or labor union to give preferential treatment to any minority group." *Id.* at 5423.

After seventeen days of preliminary debate, Senator Humphrey opened the debate on the merits of the bill with

the following description of the remedial powers available to a court under section 706(g):

> This relief is similar to that available under the National Labor Relations Act in connection with unfair labor practices . . . . *No court order can require hiring, reinstatement, admission to membership or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of Section 707(e) [enacted, without relevant change, as 706(g)].*
>
> • • • •
>
> Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission *or to any court* to require hiring, firing, or promotion of employees in order to meet a racial "quota" or to achieve a certain racial balance.
>
> That bugaboo has been brought up a dozen times; but is nonexistent. *Id.* at 6548 (emphasis added).[5]

Senator Kuchel, another of the Senate floor leaders for H.R. 7152, agreed with Senator Humphrey that "affirmative action," as used in Section 706(g), was relief designed to make whole the individual victims of unlawful discrimination. 110 Cong. Rec. 6563 (1964). He also

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[5] A comparison of Section 706(g) and the decisions of the National Labor Relations Board under Section 10(c), the remedial section of the National Labor Relations Act, is instructive. Section 10(c) provides for the reinstatement and the award of backpay and rightful place seniority to identifiable victims of discrimination. As one commentator has noted:

> [I]n drawing from labor law the concept of "affirmative action", the drafters of sections 706(g) simply intended to enable courts in Title VII cases to prevent ongoing discrimination and to restore to the *actual victims* of unlawful employment discrimination the benefits that they had lost. Comment, "Preferential Relief Under Title VII," 65 Va. L. Rev. 729, 747 (1979) (emphasis added).

expressly denied that a court would be able to grant relief in the form of court-ordered quotas:

> If the courts find that unlawful employment practices have indeed been committed as charged, then the court may enjoin the responsible party from engaging in such practices and shall order the party to take that affirmative action, such as the reinstatement or hiring of employees, with or without backpay, which may be appropriate.
>
> • • • •
>
> But the important point, in response to the scare charges which have been widely circulated to local unions throughout America, is that *the Court cannot order preferential hiring or promotion consideration for any particular race, religion or other group. Its power is solely limited to ordering an end to the discrimination which is in fact occurring.*

Id.

During the Senate debates on the bill, the principal Senate sponsors prepared a Bipartisan Civil Rights Newsletter. The purpose of the Newsletter was, as Senator Humphrey explained, "to keep Senators who are in favor of civil rights legislation informed of our point of view." *Id.* at 5042. The April 11, 1964 issue of the Newsletter expressly declared:

> Under title VII, *not even a Court*, much less the Commission, could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this Title. *Id.* at 14,465 (emphasis added).

Three documents that were inserted into the Congressional Record by Senator Clark support this interpretation of the limits of Title VII's remedial relief.[8] *See* 110 Cong. Rec. 7207-17 (1964). Of the three documents the

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[8] In *Teamsters*, this Court termed these documents "authoritative indicators" of the intent of the drafters of Title VII. 431 U.S. at 352.

most relevant is an interpretive memorandum, authored by Senators Clark and Case, the bipartisan captains for Title VII, which provides:

> No court order can require hiring, reinstatement, admission to membership, or payment of backpay for anyone who was not discriminated against in violation of this title. 110 Cong. Rec. at 7214.

The statements of Senators Clark, Case, Humphrey, Kuchel and others repeatedly made it clear that the Senate proponents of Title VII, like their colleagues in the House, never meant for the Civil Rights bill to be used as a vehicle to impose court-ordered quotas. Subsequent amendment of Title VII by Congress did nothing to affect this interpretation.

B. Congress Did Not Intend To Allow Court-Ordered Quotas When It Amended Title VII By Enacting The Equal Employment Opportunity Act Of 1972

Title VII of the Civil Rights Act of 1964 created the Equal Employment Opportunity Commission. However, during congressional debate on the Title, a compromise had been made which stripped the Commission of any enforcement powers. Following enactment of the law, civil rights advocates pushed for legislation to give the EEOC such power. Eight years later, they were successful when Congress amended Title VII by passing the Equal Employment Opportunity Act of 1972.

The Equal Employment Opportunity Act amended Title VII in nine different respects. The most important changes (1) extended coverage of Title VII to businesses and labor organizations with 15 or more employees or members, to state and local government employees, and to employees of educational institutions; and (2) established for the EEOC an independent general counsel who was authorized to bring a civil suit in federal court against an employer whom the EEOC had found was discriminating and with whom the EEOC had failed to secure a conciliation agreement. In essence, the 1972

amendments were adopted in order to give the EEOC the broader enforcement powers that civil rights advocates had been seeking ever since passage of the 1964 Act. It is clear that the impetus to amend Title VII did not arise from any desire on the part of Congress to allow courts to impose quota remedies for members of minority groups. In this regard, it is significant that section 703 of Title VII, *supra* at 7, was not amended at all. Section 706(g) was amended, however, only slightly. Language was added to this section authorizing federal courts to order "any other equitable relief as the court deems appropriate" in addition to "such affirmative action as may be appropriate" as originally provided in the 1964 Act.[7]

The new language added to section 706(g) originated in an amendment introduced by Senator Dominick during a Senate filibuster on the bill. The Dominick amendment was offered as a substitute to a provision in the bill that would confer "cease and desist" authority on the EEOC. It provided, instead, that the EEOC general counsel would be authorized to bring a civil action in federal court against an offending employer after the EEOC had failed to obtain a conciliation agreement. The Dominick amendment was adopted primarily in order to end the filibuster of the bill. *See* Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 Geo. Wash. L. Rev. 824, 844-45 (1972). Surprisingly, the modification of section 706(g) of Title VII

[7] Section 706(g) as amended reads in its entirety:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the Complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative relief as may be appropriate, which may include, *but is not limited to*, reinstatement or hiring of employees, with or without backpay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), *or any other equitable relief as the court deems appropriate*. [The new language is indicated in italics].

contained in the amendment was never explained by anyone—including Senator Dominick—during the debate over its adoption. Consequently, the only explanation for the change is contained in the Section-by-Section Analysis of the bill prepared by Senator Williams, the chairman of the Labor Committee and the manager of the legislation. It provides in part:

> Section 706(g)—*This subsection is similar to the present 706(g) of the Act. . . .*
>
> The provisions of this subsection are intended to give the courts wide discretion in exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that *the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole,* and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also *requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.* 118 Cong. Rec. 7166, 7168 (1972) (emphasis added).

Although the Section-by-Section Analysis states that 706(g) was amended in order to give courts "wide discretion in exercising their equitable powers to fashion the most complete relief possible," granting such relief remained contingent upon an individual actually being "aggrieved by the consequences and effects of [an] unlawful employment practice." Stated differently, the only kind of relief federal courts were authorized to provide remained "rightful place" relief limited to actual victims of unlawful discrimination.

The conclusion that the phrase concerning "other equitable relief" that was added to Section 706(g) by the 1972 amendments did not alter the victim-specific limitation on available federal remedies has been accepted by

this Court. In *Franks*, 424 U.S. at 764 n.21, this Court stated that in "add[ing] the phrase speaking to 'other equitable relief' in § 706(g) . . . [Congress] indicated that 'rightful place' was the intended objective of Title VII and the relief accorded thereunder." This Court further noted that the Section-by-Section Analysis of Section 706(g) was "emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require *to effect restitution, making whole insofar as possible the victims of racial discrimination* . . . ." *Id.* at 764 (emphasis added).

It is highly significant that no mention was made throughout the entire legislative history of this section—either during debate over the Dominick amendment or in the Section-by-Section Analysis prepared by Senator Williams—indicating that addition of the phrase "other equitable relief" was meant to authorize quota remedies. As it is inconceivable that so radical a departure from the anti-quota intent of the 1964 legislation would have been accomplished without any discussion whatsoever, the conclusion is inescapable that the 1972 changes in section 706(g) were not intended as an endorsement of racial quota-relief. Judicial remedial authority remained limited to making the actual victims of racial discrimination "whole" again.

Although not raised by the courts below, it has been suggested by other courts in controversies similar to the instant one that despite the fact that the legislative action undertaken by Congress in both 1964 and 1972 does not provide support for quota relief, the judicial power to order such relief may nonetheless be inferred from Congress' failure to act on certain amendments during passage of the Equal Opportunity Act of 1972.[8] Specifically, much is made of the fact that amendments introduced by

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[8] *See, e.g., Boston Firefighters Union v. Boston Chapter, NAACP*, 504 F.2d 1017, 1028 (1st Cir. 1982), which was before this Court last term but was subsequently remanded for consideration of mootness. 51 U.S.L.W. 4566 (May 17, 1983).

Representative Dent and Senator Ervin, which explicitly banned the use of racial quotas, failed to pass either the House or the Senate.

We note at the outset that use of the relatively novel theory that legislative inaction should achieve the force of law has been sanctioned by this Court only in the rarest of situations and has never been found to be sufficient, in and of itself, to constitute an authoritative indication of congressional intent. *See, e.g., Bob Jones University v. United States*, —— U.S. ——, 51 U.S.L.W. 4593, 4599-4600 (May 24, 1983). Not only is reliance on such inferences "at best treacherous", *Girouard v. United States*, 328 U.S. 61, 69 (1946), quoted in *Boys Market Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 241 (1970), but this Court has only recently affirmed, in very strong terms, that "the express procedures of the Constitution's prescriptions for legislative action" must be abided by no matter how "clumsy, inefficient, even unworkable" they might be. *Immigration and Naturalization Service v. Chada*, —— U.S. ——, 51 U.S.L.W. 4907, 4918 (June 23, 1983). Thus, in order for Congress to have authorized the remedial use of quotas by courts, it must have affirmatively taken all the steps specified in the Constitution in order for a law to exist to that effect.

Even accepting, *arguendo*, the dubious proposition that congressional intent may be inferred from congressional inaction, the congressional determinations in 1972 concerning the Dent and Ervin amendments do *not* support the view that in rejecting these amendments Congress meant to expand the limited judicial power to enable courts to order quota remedies.

The legislation that eventually became the Equal Employment Opportunity Act of 1972 began in the House in April of 1971 with the introduction of several bills designed to grant enforcement powers to the EEOC and otherwise strengthen the provisions of Title VII. One such bill, H.R. 1746, sponsored by Congressman Hawkins, contained a variety of provisions expanding the coverage

of Title VII. The bill's most significant features, however, were a provision giving the EEOC "cease and desist" powers and a proposal to transfer the authority to administer Executive Order 11246 from the Department of Labor's Office of Federal Contract Compliance (OFCC) to the EEOC.

Although the report that accompanied H.R. 1746 after it was reported out of the House Labor Committee contained no indication that the EEOC was given the power to order racial quotas many Congressmen were concerned that the bill would confer upon the EEOC such power since the OFCC had required racial quotas in its administration of Executive Order 11246 and the bill transferred OFCC's power to enforce the Executive Order to the EEOC.

In recognition of these concerns, Representative Dent, the Committee bill's floor manager, proposed an amendment to the bill shortly before debate on H.R. 1746 began. The Dent amendment provided that:

> The [Equal Employment Opportunity] Commission shall be prohibited from imposing or requiring a quot[a] or preferential treatment with respect to numbers of employees or percentages of employees of any race, color, religion, sex, or national origin. *Legislative History of the Equal Employment Opportunity Act of 1972*, 92d Cong., 2d Sess. (Comm. print 1972) 189 [hereinafter cited as 72 *Leg. Hist.*]

The express purpose of the Dent amendment was "to forbid the EEOC from imposing any quotas or preferential treatment of any employees in its administration of the Federal contract compliance program." *Id.* at 190. The amendment did not specifically address the remedial power of courts contained in section 706(g) of Title VII because, according to Representative Dent, "[s]uch a prohibition against the imposition of quotas or preferential treatment already applies to actions brought under Title VII." *Id.*

The day after Representative Dent offered his proposed amendment, House debate on H.R. 1746 began. Following opening statements both on behalf of and in opposition to the Committee bill, Representative Hawkins spoke in support of the bill. He declared that:

> *Some say this bill seeks to establish quotas . . . . Not only does Title VII prohibit this, but it establishes beyond any doubt a prohibition against any individual white as well as black being discriminated against in employment.* It only seeks to insure that persons will be treated on their individual merits and in accordance with their qualifications. *Id.* at 204 (emphasis added).

Under questioning from Representative Erlenborn, who had offered a substitute amendment for the entire Committee bill, Representative Hawkins acknowledged his support for the Dent amendment forbidding the EEOC from imposing quotas in its administration of the federal contract compliance program. He also restated his earlier expressed conviction that Title VII already "prohibits the establishment of quotas." *Id.* at 209.

The substitute amendment offered by Representative Erlenborn, H.R. 9247, differed substantially from the Committee bill that had originated with Representative Hawkins. In essence, it proposed not to give the EEOC "cease and desist" powers, not to extend Title VII to public employment, and not to transfer administration of Executive Order 11246 to the EEOC. However, Representative Erlenborn made it clear during the course of the House debate that neither the Committee bill nor his substitute "is going to repeat the prohibition against quotas that is in Title VII of the Civil Rights Act." *Id.* at 261.

Only passing reference was made to the Dent amendment during the course of subsequent House debate over the Committee bill and the Erlenborn substitute. In the House, as was later true in the Senate, the debate over amending Title VII focused almost exclusively on such

questions as whether the EEOC should be given "cease and desist" authority and whether Title VII's coverage should be extended to public employment. *See generally id.* at 191-311.

On an initial vote, the Erlenborn substitute bill carried over the Committee bill and was adopted by the House as H.R. 1746. The Dent amendment was never formally offered and was never voted upon. With passage of the Erlenborn substitute which left jurisdiction over the Executive Order with the OFCC, the Dent amendment had become moot.

Given the legislative history of H.R. 1746, it is clear that the House failure to pass the Dent amendment can in no way be construed as support for the proposition that the House approved court-ordered quotas under Title VII. On the contrary, not a single representative suggested at any stage of the House debate that a court could order quota remedies under Title VII. Just the opposite view was expressed. There was unanimous agreement that quotas were *not* available under Title VII as passed in 1964 and that the Title, as amended by the House, would and should continue to bar such quotas.

If allowing the legislative inaction of *both* Houses of Congress to achieve the force of law is "at best treacherous," *Girouard v. United States*, 328 U.S. at 69, little can be said for relying upon the legislative inaction of only *one* House of Congress. Yet in view of the fact that the House opposed quota remedies, the argument that "Congress" acquiesced in quota remedies is based exclusively on the Senate's refusal to pass the Ervin amendment. However, an examination of the legislative debate surrounding rejection of the Ervin amendment reveals once again that the case for quota remedies cannot be made.

The Equal Employment Opportunity Act was introduced into the Senate by Senator Williams as S. 2515. As reported by the Senate Labor and Public Welfare Committee, the main feature of S. 2515 was that it authorized

the EEOC to issue its own enforcement orders, subject to judicial review, directing discriminatory employers to cease their unfair practices. Most of the five week debate that followed on S. 2515 was conducted by five Senators. Senators Williams and Javits, the chairman and ranking minority members of the Labor Committee, were the floor managers and chief advocates of giving the EEOC authority to enforce its own "cease and desist" orders. They were opposed in their efforts by Senators Ervin and Allen, who said the bill would create tyrannous power in the EEOC, and by Senator Dominick who was the chief advocate for the court-enforcement approach that was ultimately adopted.

During the debate on S. 2515, Senator Ervin proposed an amendment which would have prohibited any "department, agency, or officer of the United States" from "requir[ing] any employer to practice discrimination in reverse by employing persons of a particular race . . . in either fixed or variable numbers, proportions, percentages, quotas, goals, or ranges." 72 *Leg. Hist.* at 1017.

The Ervin amendment was addressed primarily to the OFCC's adoption of the Philadelphia Plan, "[t]he most notorious example of discrimination in reverse," and secondarily to "[t]he EEOC," which "on less frequent occasions, has hailed employers before its bar to practice discrimination in reverse." *Id.* at 1042-45. Senator Ervin explained that such an amendment was necessary because officials of the OFCC and the EEOC "could not understand the plain and unambiguous words of Congress" in section 706(j).[9] Thus, the Ervin amendment was intended to extend 703(j)'s substantive liability to all federal executive agencies, particularly the OFCC and the EEOC. The

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[9] Section 703(j) of Title VII, which concerns the *substantive reach* of the Act rather than the *remedial* power of the courts, provides that "[n]othing contained in [Title VII] shall be interpreted to require any employer . . . to grant preferential treatment to any individual or group on account of" a racial imbalance in the employer's workforce.

amendment had nothing to do with the remedial authority of courts under Section 706(g) of Title VII. Consequently, even though the Ervin amendment was defeated in the Senate it cannot be taken as a congressional decision to alter the judicial remedial scheme under Section 706(g). The most that can be inferred is that in rejecting the Ervin amendment the Senate did not want to extend Section 703(j)'s substantive limitations to Executive Order 11246. However, four reasons exist for not drawing even this limited inference.

First, the Ervin amendment was offered as part of an effort to prolong an ongoing filibuster. It is entirely plausible that certain Senators seeking to end the filibuster (and who had consistently voted against all the amendments proposed by Senator Ervin) were not voting on the substance of each amendment but on the judgment that the way to end the filibuster was to vote down each amendment introduced by the filibuster's proponents regardless of the merits.

Second, it is plausible that certain Senators voted down the Ervin amendment because they agreed with Senator Williams when he declared during debate that the amendment could "be read to deprive the courts of *any* power to remedy clearly proven cases of discrimination." *Id.* at 1072-73. Thus, although these Senators may have opposed quota relief they may also not have wanted to see the courts deprived of all power to order victim-specific relief as well.

Third, not even the slightest evidence exists to suggest that the Senate decided to authorize quota remedies by amending Title VII in 1972. A step this controversial could not have failed to provoke heated debate, and yet not one shred of evidence suggests that this was the Senate's intent. On the contrary, the Section-by-Section Analysis of the 1972 amendments expressly provides that "[i]n dealing with the present Section 706(g) the courts have stressed that the scope of relief under that section

of the Act is intended to make victims of unlawful discrimination whole. . . ." *See supra* at 16-17.

Finally, even assuming, *arguendo*, the Senate favored courts ordering quota relief, the fact remains that the House unequivocally opposed racial quota relief. Consequently, legislative inaction by one House of Congress is insufficient to overturn the decision made eight years earlier by *both* Houses and signed into law by the President that banned court-ordered quotas. Accordingly, the racially-based layoff quotas ordered by the district court in favor of nonvictims of racial discrimination were unlawful.

III. THE DISTRICT COURT'S ORDER MODIFYING THE 1980 DECREE CONTRAVENES TRADITIONAL EQUITABLE PRINCIPLES REGARDING THE SCOPE OF REMEDIAL RELIEF

It is well-settled by now that while the reach of federal equitable power is broad, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971), it is not plenary. When federal courts exercise the traditional attributes of equity power they are "required to tailor 'the scope of the remedy' to fit 'the nature and extent of the . . . violation.'" *Hills v. Gautreaux*, 425 U.S. 284, 293-294 (1976).[10] Stated another way, the judicial remedial

[10] It is important to recognize that affirmative equitable remedies are, by their very nature, limited in scope. The extent of the remedy is determined by the extent of the injury. To quote Professor Pomeroy: ". . . the nature and extent of remedial rights and duties, and of the remedies themselves, must depend upon . . . the nature and extent of the primary rights which are violated, and the nature and extent of the wrong in and by which the violation is effected." 1 Pomeroy's Equity Jurisprudence 91 at 120 (5th ed. S. Symons 1941). In the instant case, the "remedy" the district court afforded the respondents was the abrogation of the City's seniority system; that system, however, was never found to have "injured" any of the respondents. Indeed, not only was the seniority system bona fide, but none of the respondents can claim that but for an illegal discriminatory refusal to be hired, they would have enjoyed greater seniority and therefore that they suffered an injury. *Cf. Franks*, 424 U.S. at 758.

powers of a federal court can "be exercised only on the basis of a violation of the law and extend no further than required by the nature and the extent of that violation." *General Building Contractors Ass'n v. Pennsylvania*, 102 S.Ct. 3141, 3154 (1982).

Past decisions of this Court have illustrated this principle in the context of suits in which racial discrimination has been alleged and found to exist. For example, in *Milliken v. Bradley*, 418 U.S. 717 (1974), the district court, pursuant to its equitable powers, ordered a multidistrict desegregation plan after finding that various acts of state officials had created racial segregation in the Detroit school system. The court of appeals affirmed. This Court, however, reversed holding that the proposed multidistrict remedy went beyond the constitutional violation because there had been no demonstration that the unconstitutional acts committed by officials of the Detroit school system had caused any racial segregation in the suburban school districts affected by the court's decree. In explicit terms this Court stated:

> [A desegregation] remedy is necessarily designed, *as all remedies are*, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct. Disparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere, and on this record *the remedy must be limited to that system.* 418 U.S. at 746 (emphasis added).

Similarly in *Pasadena City Bd. of Education v. Spangler*, 427 U.S. 424 (1976), this Court found that the district court had exceeded its remedial authority by enforcing desegregation orders so as to require an annual readjustment of attendance zones to ensure a precise racial mix absent constitutional violations. 427 U.S. at 434-35.

These and other cases stand for the proposition that the Constitution does not require, either as a matter of substantive right or as a matter of remedy, that any particular racial balance be maintained in the City of Mem-

phis' Fire Department. On the contrary, this Court has counseled against "equating racial imbalance with a constitutional violation calling for a remedy." *Milliken v. Bradley*, 418 U.S. at 741 n.19. There exists no "substantive constitutional right to a particular degree of racial mixing or balancing." *Pasadena*, 427 U.S. at 433-34; *Swann*, 402 U.S. at 24. What the Constitution does require in a remedial context, and what federal courts have the inherent equitable authority to order, is that individuals whose personal rights to nondiscriminatory treatment have been violated be restored as nearly as possible to their rightful places.

Accordingly, the racial layoff quotas that the district court mandated through the modification of the 1980 Decree clearly exceeded the traditional and fundamental limitations on the court's remedial authority to order affirmative equitable relief. The district court ordered, and the court of appeals approved, a broad decree overriding a concededly valid seniority system that was designed to aid *non*victims of racial discrimination. The question, then, becomes whether Congress, in enacting Title VII of the Civil Rights Act of 1964, intended to broaden judicial remedial authority in employment discrimination cases beyond traditional limits to include such remedial quota relief. However, as section II, *supra* at 7-24, demonstrated, Congress intended no such broadening of judicial remedial power. To the contrary, the language and legislative history of Title VII's remedial provision—Section 706(g)—both as enacted in 1964 and as later amended in 1972 demonstrate Congress' intention that racial quotas *not* be included among the affirmative equitable remedies available to courts.[11]

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[11] Both the 1974 and 1980 Decrees imposed racial quotas on the City's hiring and promotion policies. Because consent decrees are judgments and because, in accepting a consent decree, a court has the duty to ascertain that it is not putting "the court's sanction on and power behind a decree that violates Constitution, statutes or jurisprudence," *United States v. City of Miami*, 664 F.2d 435, 439

IV. THE DISTRICT COURT'S MODIFICATION OF THE 1980 DECREE WAS IMPROPER BECAUSE IT EXCEEDED THE NEGOTIATED TERMS OF THE DECREE

The 1980 Decree contained a provision stating that the district court would have continuing jurisdiction over the controversy to issue ". . . such further orders as may be necessary to effectuate the purposes of the decree." Pet. App. at A69. However, the modification undertaken by the district court was not limited to remedying the hiring and promotional violations to which the remedial provisions of the 1980 Decree were restricted. Instead, the modification concerned seniority. The district court's remedial "modification" therefore exceeds the carefully negotiated terms of the parties' agreement. The court reached out to embrace a subject that was never contemplated by the parties and, in the process, violated the guidelines for interpreting consent decrees set down by this Court:

> Consent decrees are entered into by parties to a case after careful negotiation has produced an agreement on their precise terms. . . . the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and the skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971) (emphasis added).

(5th Cir. 1981), we recognize that our arguments in both sections II and III apply with equal force to the 1974 and the 1980 Decrees; that is, both decrees are unlawful because each mandated racial hiring and promotion quotas on behalf of nonvictims of discrimination in violation of Title VII and the traditional equitable limitations on a court's remedial authority. However, the validity of the district court's action in accepting the 1974 and 1980 Decrees is an issue that is not presently before this Court.

The underlying allegation of racial discrimination contained within the "four corners" of the 1980 Decree concerned hiring and promotion violations. The parties negotiated over and the 1980 Decree treated only those matters. There has been no finding that the Fire Department failed to comply with the Decree. On the contrary, progress was being made in accordance with the terms of the Decree at the time the City was forced to layoff workers. Moreover, at no point in this litigation have respondents challenged the bona fide character of the seniority system.[12] Consequently, although the district court purported to effectuate its remedial relief for hiring and promotion discrmination, it plainly exceeded the "four corners" of the document it was construing in order to override a bona fide seniority system not mentioned in the 1980 Decree and was never found to have been non-bona fide.

The district court's modification of the Decree, if upheld by this Court, would subject parties to a consent decree to a virtually unlimited power of modification by district courts based solely upon whatever the district court judge felt the parties *would have* agreed to had they considered the possibility of "new and unforeseen conditions" such as a fiscal crisis. However, the law is clear. Settlements such as the one negotiated by the instant parties, are "not to be judged against a hypothetical or speculative measure of what *might* have been achieved by the negotiators." *Officers for Justice v. Civil Service Comm.*, 29 FEP Cases 1473, 1480 (9th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). Accordingly, the modification was unlawful and cannot be upheld by this Court.

V. THE DISTRICT COURT'S ORDER IS CONTRARY TO THE PUBLIC INTEREST

The district court's modification of the 1980 Decree would allow nondiscriminatees to displace innocent incum-

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[12] *See also supra* note 2.

bents from their jobs in times of economic hardship. In addition to being contrary to law and the legislative history of the Act, displacement of innocent nonminorities in these circumstances is also contrary to the public interest.

Seniority is viewed by workers as an important earned right. Moreover, this Court has stressed that the maintenance of seniority systems is of "overriding importance" in labor law. *Humphrey v. Moore*, 375 U.S. 335, 346 (1964). Job displacement by nullifying accrued seniority, based upon mere allegations of discrimination, not only ignores the importance of seniority systems but is likely to render incumbent workers hostile toward displacing discriminatees. "[T]he displacement of whites lends credence to the idea that majority-minority interests are inherently opposed; that the subjugation of blacks is requisite to the well-being of whites; that blacks can best improve their position by attacking the interests of whites." Burke & Chase, *Resolving the Seniority/Minority Layoffs Conflict: An Employees Targeted Approach*, 13 Harv. C.R.-C.L. L. Rev. 81, 94 (1978).

Furthermore, the imposition of court-ordered quotas will ultimately result in widescale litigation based on a breach of the seniority provisions that are normally found in collective bargaining agreements. Such agreements are a product of the employer-union-employee bargaining process which is vital to the governance of industrial relations. "It does not behoove a court to second-guess either that process or its products." *California Brewers Association v. Bryant*, 444 U.S. 598, 606 (1980).

The court-ordered racially-based layoff quotas are contrary to the public interest for one final reason. As Professor Alexander Bickel stated:

> [A] racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principal as well as in practice. Moreover, it can as easily be turned against those it purports to help. The history of the racial quota is a

> history of subjugation, not beneficence. Its evil lies not in its name but in its effects; a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant.

A. Bickel, *The Morality of Consent* 133 (1975).

CONCLUSION

For the foregoing reasons, the Washington Legal Foundation submits that the decisions of the lower courts must be reversed.

Respectfully submitted,

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Nos. 82-206, 82-229

In the Supreme Court of the United States

OCTOBER TERM, 1983

FIREFIGHTERS LOCAL UNION NO. 1784, PETITIONER

v.

CARL W. STOTTS, ET AL.

MEMPHIS FIRE DEPARTMENT, ET AL., PETITIONERS

v.

CARL W. STOTTS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This brief will address the following question:

Whether the district court exceeded its authority by prohibiting the City of Memphis from laying off and demoting personnel in its fire department on the basis of accumulated seniority in order to maintain the percentage of minority employees in the department who had been hired and promoted pursuant to a consent decree entered into as a settlement of suits charging discrimination in the department's hiring and promotion practices.

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In the Supreme Court of the United States

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE UNITED STATES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.*, prohibits, *inter alia*, racial discrimination in employment. The Attorney General is responsible for the enforcement of Title VII in cases such as this one where the employer is a government, governmental agency, or political subdivision. 42 U.S.C. 2000e-5 (f) (1). This Court's resolution of the issue presented in this case, *viz.*, the propriety of a preliminary injunction requiring that layoffs and demotions of city employees be made not on the basis of a bona fide seniority system,

but rather pursuant to a modified seniority system designed to assure that recently hired and promoted minority employees retain their positions, will have a substantial effect on the Attorney General's enforcement responsibilities under Title VII.

STATEMENT

1. In February 1977, Carl Stotts, a black Captain in the Memphis Fire Department, filed suit in the United States District Court for the Western District of Tennessee against the City of Memphis, the City's Director of Personnel, the Memphis Fire Department, and the Department's Director of Fire Services. The complaint, styled as a class action, alleged that the defendants had engaged in racially discriminatory hiring and promotion practices, in violation of Title VII of the 1964 Civil Rights Act and 42 U.S.C. 1981 and 1983 (Pet. App. A4).[1]

In June 1979, Fred Jones, a black Private in the Fire Department, filed an individual action in the same district court under Title VII and 42 U.S.C. 1983 against the same defendants. Jones alleged in his complaint that he had been denied a promotion to the rank of Fire Inspector because of his race. In September 1979, the district court ordered the cases consolidated (Pet. App. A5).[2]

Subsequently, in April 1980, all of the parties to the consolidated cases agreed to a settlement, which was approved by the district court. In the decree, the City did not admit to having violated any laws; nevertheless it committed itself to a long-term goal of increasing minority representation in each job classification in the De-

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 82-206.

[2] Neither of the complaints raised any issue with respect to layoffs or demotions within the Department.

partment to levels approximating the level of minority representation in the local labor force.[3]

The decree also established a 50% interim hiring goal and 20% interim promotion goal for qualified minorities.[4] Except for a general commitment by the City not to discriminate on the basis of race "with respect to compensation, terms and conditions or privileges of employment" (*id.* at A62), the decree was silent as to the manner in which any layoffs or demotions in the Department were to be conducted.

2. On May 4, 1981, the City announced that for the first time in its history projected budget deficits required personnel reductions in all major departments. The reductions were to be made on the basis of city-wide seniority (Pet. App. A8). Although the City had no formal

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[3] The City had committed itself to the same long-term goal in a consent decree entered into with the United States in 1974 in litigation involving allegations of employment discrimination in violation of Title VII in various city agencies, including the Memphis Fire Department. The City did not admit any misconduct in that decree, but did acknowledge that its employment practices gave rise to an inference of race and sex discrimination (Pet. App. A3).

According to the evidence presented at the preliminary injunction hearing held in 1980, 56% of the persons newly hired by the Department since the entry of the 1974 consent decree have been black (46% including rehires), and 16-17% of the promotions in the Department since that time have gone to blacks (J.A. 48, 57). In 1974, blacks constituted about 32% of the labor force in Shelby County, Tennessee, and approximately 3-4% of the Fire Department (J.A. 47). By 1980, blacks constituted approximately 35% of the labor force in Shelby County (Pet. App. A22 & n.14), and about 10% of the employees in the Fire Department (*id.* at A9 n.5).

[4] The decree provided that "[g]oals established herein are to be interpreted as objectives which require reasonable, good faith efforts on the part of the City, and not as rigid quotas" (Pet. App. A64). It explained further that "[n]othing in this * * * Decree should be construed in such a way to require the promotion of the unqualified or the promotion of the less-qualified over the more qualified as determined by standards shown to be valid and non-discriminatory * * *" (*id.* at A65).

collective bargaining agreements with any of the unions representing its employees, the City had entered into "memoranda of understanding" with the unions, including the petitioner union in this case (J.A. 116-119). These memoranda provided generally for terms and conditions of employment with the City; the memorandum covering the Fire Department provided that "[i]n the event it becomes necessary to reduce the Fire Division, seniority * * * shall govern layoffs and recalls" (J.A. 119). The last-hired, first-fired policy adopted by the City for conducting its proposed layoffs was chosen because of the memoranda of understanding (*id.* at 49).

On the day the layoff program was announced, the district court granted respondents' application for a temporary restraining order prohibiting the City from laying off or demoting[5] any minority employee in the Fire Department (J.A. 23). Petitioner Firefighters Local Union No. 1784 was then permitted to intervene with the consent of the parties (Pet. App. A8).

On May 8, 1981, the court held a hearing on respondents' motion for a preliminary injunction. In order to stay within its budget, the Fire Department proposed to eliminate approximately 55 positions in which there were current employees (J.A. 51). It estimated that the layoff process would result in a reduction in the percentage of black employees in the Fire Department from approximately 11% to 10% (J.A. 54).

Of the 55 positions to be eliminated, most were in the firefighting bureau in the Department (J.A. 52-53, 73, 96-97). The City anticipated that the temporary demotions would result in the percentage of black Lieutenants in the Department being reduced from 12.1% to 6.3%,[6]

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[5] Under the layoff program, Fire Department employees in ranks above Private who were scheduled to be laid off were afforded the option, if they were qualified to do so, of accepting a demotion, thereby "bumping" a junior employee in the lower rank (J.A. 38-39, 64-65).

[6] Before the scheduled demotions, 29 of the Department's 240 Lieutenants were black; after the demotions, 14 of 224 Lieutenants would have been black (Pet. App. A75; J.A. 21).

and that of black drivers from 4.8% to 4.2%[7] (J.A. 96-97; Pet. App. A11 n.5). In the fire fighting bureau, an additional 16 or 17 Private positions were to be eliminated, but the record does not reflect the race of the persons occupying those positions (J.A. 67).

The City estimated that, as a result of layoffs, 52 persons in the Fire Department would be furloughed, of whom 32 (or 61.4%) would be white and 20 (or 38.6%) black (J.A. 65-72). The Mayor of the City testified that he anticipated that attrition would result in restoring demoted or furloughed employees to their former positions within six months to two years (J.A. 39).

3. On May 18, 1981, the district court entered an order granting a preliminary injunction against the City's proposed layoffs (Pet. App. A77-A79). The court found that the 1974 and 1980 consent decrees did not address layoffs or demotions, and that memoranda of understanding between the City and the petitioner union specified that layoffs in the Fire Department were to be made on the basis of city-wide seniority (*id.* at A77-A78).[8] The court further found that the City's layoff plan was not adopted with the purpose or intent to discriminate on the basis of race, but that the effect of these layoffs and reductions in rank is "discriminatory" (*id.* at A78).[9] Based on this finding, the court concluded that the layoff program "is not a bona fide seniority system" (*ibid.*).

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[7] Before the demotions, 15 of the Department's 311 Drivers were black; after the demotions, 13 of 299 Drivers would have been black (Pet. App. A75; J.A. 21, 96-97). Although 8 black Drivers were to be demoted to Private, 6 black Lieutenants were to be demoted to Driver (J.A. 96). Thus the number of black Drivers would have been reduced by only two as a result of the planned demotions.

[8] The court characterized the legal effect of the memoranda under Tennessee law as "uncertain" (Pet. App. A78).

[9] The district court made no findings concerning the statistical impact of the City's layoff program upon minorities either in the Department generally or at any of the various ranks in the Department.

The district court ordered "the defendants not [to] apply the seniority policy proposed insofar as it will decrease the percentage of black lieutenants, drivers, inspectors and privates that are presently employed in the Memphis Fire Department" (*ibid.*). The court later expanded its injunction to include the positions of Fire Alarm Operator I, Fire Prevention Supervisor and Clerk Typist (*id.* at A12).

4. The court of appeals affirmed (Pet. App. A1-A51). The court of appeals agreed with the district court that the City's layoff plan would have a disproportionate adverse effect upon minorities in the Department (*id.* at A8). In light of the district court's unchallenged finding that the City's layoff policy was not adopted with a racially discriminatory purpose, however, the court of appeals set aside the lower court's ruling that the layoff program was not a bona fide seniority system (*id.* at A11 n.6, A41).[10]

The court defined the principal issue on appeal as "whether the district court erred in modifying the 1980 Decree to prevent minority employment from being affected disproportionately by unanticipated layoffs" (*id.* at A12). In deciding that issue the court of appeals first considered whether the 1980 Decree itself was reasonable. It found that the temporary hiring and promotion goals were reasonable and did not unduly abridge the interests of incumbent employees, and therefore were constitutional. Furthermore, the majority held that the district court had conducted an adequate hearing before approving the consent decree (Pet. App. A14-A23).

The court next considered whether modification of the consent decree was proper under general contract principles. Under this theory the court held that the modification was permissible because the "City contracted" to provide "a substantial increase in the number of minorities

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[10] The court found it unnecessary to resolve the question whether the memorandum of understanding between the City and the Union was enforceable under Tennessee law (Pet. App. A33 n.20).

in supervisory positions" (Pet. App. A32) and the layoffs would be a breach of the contract. The district court's modification of the decree merely relieved the City of the full burden that compliance with its contract would have caused (*id.* at A34).

Alternatively, the court of appeals held that the district court could modify the decree to adapt to an unforeseeable change in circumstances. The court upheld the district court's general findings that the City's economic crisis was unanticipated and that the layoffs would undo much of the effect of the affirmative relief in the 1980 decree (Pet. App. A57).

Finally, the court considered the effect of seniority rights on the authority of the district court to protect minorities from layoffs. The court held that a consent decree remedying violations of federal law can modify collective bargaining agreements, including their seniority provisions (Pet. App. A38-A45).

Judge Martin concurred in part and dissented in part (Pet. App. A46-A51). He agreed generally with the majority that the district court did not abuse its discretion in granting a preliminary injunction; however, he disagreed with virtually every specific holding of the majority. He disagreed that the consent decree read as a contract could be construed to require modification of the City's seniority system (*id.* at A46); he rejected the holding that the district court had authority to abrogate the union's contractual and statutory rights (*id.* at A48); and he dissented from the majority's approval of the underlying consent decree and rejection of the union's alternative proposals on the ground that those issues were not properly before the court (*id.* at A49-A50). Finally, he dissented from the "sua sponte conclusion [of the majority] that the decree is 'constitutional.'" (*id.* at A50).[11]

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[11] According to respondents' suggestion of mootness and petitioners' joint response thereto, all of the firefighters who were laid

SUMMARY OF ARGUMENT

1. This Court has repeatedly held that in exercising the equitable authority granted in Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.*, courts are limited by the general policies and overall objectives of the Act. See, *e.g.*, *Ford Motor Co.* v. *EEOC*, No. 81-300 (June 28, 1982), slip op. 7-8. One policy of "overriding importance" in labor law generally (*Humphrey* v. *Moore*, 375 U.S. 335, 346 (1946)), and of special significance under Title VII, is the preservation of seniority systems and the protection of the rights they

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off or demoted have now been restored to their former positions. The reinstatement of the employees, however, does not appear to moot the case.

A case is moot if (1) it can be said with assurance that there is no reasonable expectation that the enjoined conduct will recur and (2) interim events have completely and irrevocably eradicated the effects of the injunction. *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979). Neither condition appears to be satisfied here. The City asserts in its response to the suggestion of mootness (Jt. Opp. to Suggestion of Mootness 5) that it "cannot provide assurances that further layoffs for fiscal reasons will not be necessitated during the effective period of the consent decree in this matter." Unlike *Boston Firefighters Union* v. *Boston Chapter*, NAACP, No. 82-185 (May 16, 1983), this case does not involve a state statute protecting those who were laid off or demoted from future reductions in force. Thus, it cannot be said with any assurance that the controversy giving rise to this litigation will not recur. Nor can it be said that the reinstatements have completely eradicated the effects of the layoffs and demotions. According to petitioners, those laid off lost pay and seniority, and, in some instances, the opportunity to take promotional exams (Jt. Opp. to Suggestion of Mootness 5-6 and n.1).

In these circumstances, respondents do not appear to have satisfied their "heavy" burden (*United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632-633 (1953)) of showing that "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969). Rather, the controversy in this case still appears to be "definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 240-241 (1937).

confer. *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977); 42 U.S.C. 2000e-2(h).

Congress demonstrated particular concern in 1964 that the proposed Title VII might impair the legitimate interests of incumbent employees (see, *e.g.*, 110 Cong. Rec. 486-489 (1964) (remarks of Sen. Hill), and accordingly conferred immunity under Section 703(h) of Title VII to bona fide seniority systems. Consistent with this congressional intent, this Court has generally resisted efforts by litigants to modify seniority systems. See, *e.g.*, *Teamsters* v. *United States*, 431 U.S. 324 (1977); *American Tobacco Co.* v. *Patterson*, 456 U.S. 63 (1982). The only exception to this rule is the use of constructive seniority as a proper remedy for identifiable victims of discrimination, because it equitably places them in their rightful slot within the seniority system and does so without in any way modifying that system. See *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976). This exception is justified because of Congress's overriding desire to "make whole" *individual* victims of discrimination. See *Connecticut* v. *Teal*, 457 U.S. 440 (1982).

But this case involves both a bona fide seniority system and claims solely by individuals who have never shown that they were actual victims of discrimination. This Court had virtually the same situation before it in *Teamsters* v. *United States*, 431 U.S. 324 (1977), and held in a slightly different context that no modification of the employer's seniority system was justified.

The district court's order amounts to nothing more than a retroactive effort to confer constructive seniority rights identical to those denied the employees in *Teamsters* who could not show that they were victims entitled to be slotted into the seniority system. Time has passed and the financial condition of the employer has worsened. But the minorities involved are still non-victims of discrimination who can receive relief only at the expense of "bumping" incumbent white employees. See *Patterson* v.

American Tobacco Co., 535 F.2d 257 (4th Cir. 1976). Moreover, in order to grant this relief, the district court must substantially modify the seniority system as it applies to layoffs and demotions and thereby undermine the City's legitimate purpose in adopting the system negotiated with the union representing its employees. Accordingly, the reasoning and holding of *Teamsters* directly control this case and forbid the modification of the decree at issue here.

2. The district court's order, requiring non-victim minorities who are discharged or demoted because of seniority to be retained, is contrary to the last sentence of Section 706(g), 42 U.S.C. 2000e-5(g), which precludes a district court from ordering reinstatement or promotion if the reason for an employee's release or demotion is something other than race or sex, etc. The last sentence in Section 706(g), which reflects the statutory intent to "make whole" actual victims of racial discrimination, permits employers to make employment decisions on any basis other than race and thus immunizes the decision of the City of Memphis to lay off minority employees who are not victims of discrimination and who have less seniority than other employees.

3. By concluding that Title VII permitted the race conscious order at issue, the courts below have unnecessarily created a difficult constitutional issue under the equal protection component of the Due Process Clause of the Fifth Amendment, regarding the scope of Congress's power under Section 5 of the Fourteenth Amendment to authorize courts to provide for race conscious remedies. Accordingly, the Court should vacate the order as inconsistent with Title VII in order to avoid the constitutional issue that otherwise would exist. See *United States* v. *Security Industrial Bank*, No. 81-184 (Nov. 30, 1982); *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979).

ARGUMENT

THE DISTRICT COURT'S ORDER EXCEEDED ITS REMEDIAL AUTHORITY UNDER SECTION 706(g) OF TITLE VII

The opinion of the court of appeals touches on a variety of issues relating generally to affirmative action, consent decrees and collective bargaining agreements, but the court's analysis never reaches the real issue in this case, viz., whether a district court can modify a consent decree, which was designed solely to remedy hiring and promotion discrimination, in order to grant minority individuals, who have made no showing that they were victims of discrimination, rights that are superior to the seniority rights of white employees. Thus, regardless of the validity of the original decree and the relationship in general between consent decrees and collective bargaining agreements—the issues that preoccupied the court of appeals—this Court's decisions make clear that a court cannot, consistent with Title VII of the Civil Rights Act of 1964, in effect abrogate a seniority system on behalf of non-victims in order to protect them from layoffs or demotions that otherwise would occur on the basis of the last-hired, first-fired rule.[12]

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[12] A threshold question is whether this case is controlled by Title VII principles. The complaint filed by the United States in 1974 was predicated solely on Title VII, but the complaints of the respondents alleged, in addition to a Title VII violation, that the employment practices of the Fire Department violated 42 U.S.C. 1981 and 1983 (J.A. 8, 15). The consent agreement, itself, is plainly limited to Title VII; the City expressly denied any violations of law, but entered into the agreement "to insure that any disadvantage to minorities that may have *resulted* from past hiring and promotional practices be remedied" (Pet. App. A59-A60; emphasis supplied). This settlement thus is plainly limited to respondents' Title VII claim that the City's employment practices have a discriminatory effect. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). The City did not concede that it engaged in any purposeful discrimination, nor has any court made such a finding, which would be required for this case to be controlled by principles other than Title VII's. See *Washington* v. *Davis*, 426 U.S. 229 (1976); *General*

Although this case was settled, it is clear that for present purposes the remedial authority of the district court under 42 U.S.C. 2000e-5(g) is the same as if the case had gone to a final, litigated judgment.[13] Once it is adjudged that an employer has engaged in an unlawful employment practice within the meaning of Title VII, a district court is invested with authority to enjoin the employer from engaging in that practice in the future, and also is empowered to "order such affirmative action as

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Building Contractors Association v. *Pennsylvania*, No. 81-280 (June 29, 1982). Accordingly, the propriety of the district court's remedial order must be measured by Title VII standards.

[13] The opinion of the court of appeals basically ignores Title VII and focuses exclusively on the authority of a district court to implement a consent decree in light of the parties' intent and to adapt the decree to changed circumstances. The effect of the court's reasoning, however, is to grant the district court greater remedial authority in a Title VII case concluded by consent decree than the court would have if the case had been litigated to final judgment and a remedial order entered. Obviously, such a result would seriously deter employers from entering into consent agreements under Title VII. This would be in direct contravention of Congress's expressed preference for voluntary settlement of employment discrimination suits. See *W. R. Grace & Co.* v. *Local 759*, No. 81-1314 (May 31, 1983), slip op. 13; *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 368 (1977); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Moreover, a "District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce." *System Federation* v. *Wright*, 364 U.S. 642, 651 (1961).

Nor can the expansive relief ordered in this case be justified on the theory that respondents relied on the consent decree to assure their employment, "hav[ing] foregone their right to litigate the City's past employment practices and possibly obtain greater relief" (Pet. App. A37). Respondents already had been granted substantial affirmative relief in the form of hiring goals that were more than satisfied by the City. Since respondents were not themselves victims of any discrimination, the district court could not have granted them any constructive seniority. *Teamsters* v. *United States*, *supra*. Accordingly, respondents could hardly have obtained any greater affirmative relief after trial than they received under the settlement.

may be appropriate, which may include * * * reinstatement, or hiring of employees, * * * or any other equitable relief as the court deems appropriate." 42 U.S.C. 2000e-5(g). Although the grant of equitable authority on its face is broad, it is necessarily constrained by the policies of the Act, as reflected in its substantive provisions. Compare *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99, 108 (1970). See also *Ford Motor Co.* v. *EEOC*, No. 81-300 (June 28, 1982), slip op. 8; *Teamsters* v. *United States*, 431 U.S. 324, 364 (1977); *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 405 (1970).

A. The Order Of The District Court Disregards The Important Statutory Policy Embodied In Section 703(h), 42 U.S.C. 2000e-2(h), To Protect Seniority Systems, Ignores The Legitimate Interests Of Incumbent Employees In Those Systems And Grants Unwarranted Protection To Non-Victims Of Discrimination

What the court of appeals' discussion of the consent decrees and collective bargaining agreements completely ignores is that seniority is not just another term in a collective bargaining agreement. There is a special statutory importance attached to seniority systems and the rights those systems allocate to employees that bears significantly on the propriety of a district court's exercise of equitable authority. See *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 75-76 (1982); *California Brewers Association* v. *Bryant*, 444 U.S. 598, 606-607 (1980); *Humphrey* v. *Moore*, 375 U.S. 335, 346 (1964). This Court has pointed out that "seniority systems are afforded special treatment under Title VII itself." *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 81 (1977). Section 703(h), 42 U.S.C. 2000e-2(h), by its terms, immunizes all bona fide seniority systems from challenge under Title VII, even systems, such as the one in this case, that have a disproportionate adverse impact on minorities (*Teamsters* v. *United States*, *supra*), or op-

erate to perpetuate past employment discrimination (*United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977)).[14]

Members of Congress in 1964 were very concerned about the possible effect the proposed Title VII might have on the seniority rights of employees. See H.R. Rep. No. 914, 88th Cong., 1st Sess. 71-72 (1963); 110 Cong. Rec. 486-487 (1964) (remarks of Sen. Hill). Accordingly, Senator Clark, one of the the floor managers of the bill, submitted a Justice Department memorandum stating that the proposed Title VII would not affect existing seniority rights. 110 Cong. Rec. 7207 (1964); *id.* at 7212-7215; *id.* 7216-7217 (remarks of Sen. Clark).

During the Senate debates, Section 703(h) was included in the substitute bill that eventually was adopted. The provision was adopted to clarify the Act's "present intent and effect" with regard to seniority. 110 Cong. Rec. 12723 (1964) (remarks of Sen. Humphrey); *id.* at 12818-12819 (remarks of Sen. Dirksen).[15] Congress thus intended generally to accord special status to seniority systems and the stability that they provide to labor relations and specifically expressed concern that Title VII not operate to modify the last-hired, first-fired principle that lies at the heart of most seniority systems. Accordingly, Title VII remedies must be designed to preserve the fundamentals of bona fide seniority systems. Compare *American Tobacco Co.* v. *Patterson*, *supra*; *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 559 (1977); *Teamsters* v. *United States*, *supra*; *California*

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[14] Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h), provides, in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority * * * system * * * provided that such differences are not the result of an intention to discriminate because of race * * *.

[15] Congress made no change in Section 703(h) when it revised Title VII in 1972. See *Teamsters* v. *United States*, *supra*, 431 U.S. at 354 n.39.

Brewers Association v. *Bryant*, 444 U.S. 598 (1980), with *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976).

Under this Court's decisions, the only accommodation that a bona fide seniority system must make under Title VII is to allow actual victims of discrimination to be slotted into their rightful place in the system. See, *e.g.*, *Franks* v. *Bowman Transportation Co.*, *supra*. *Franks* involved a discrimination claim by a class of black non-employee applicants who had unsuccessfully sought employment as over-the-road truck drivers. The district court found that the employer had engaged in a pattern of racial discrimination in hiring, transfer and discharge of employees. The district court ordered the employer to give priority consideration to class members for over-the road jobs, but declined to award back pay or constructive seniority retroactive to the date of the individual's application. The court of appeals reversed the district court's ruling on back pay, but affirmed its refusal to award retroactive seniority.

This Court held that for actual victims of unlawful discrimination constructive seniority back to the date of the discriminatory act was an appropriate remedy in order to restore those victims to their "rightful place," that is, restore them "to a position where they would have been were it not for the unlawful discrimination." 424 U.S. at 764, quoting 118 Cong. Rec. 7168 (1972). See also *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975).

The Court's remedial holding granting make-whole relief to individual victims reflects Congress's dominant concern in Title VII for protecting the individual. Unlawful employment practices are defined by an employer's decision to hire or fire "any individual, or otherwise to discriminate against any individual * * * [or to] deprive or tend to deprive any individual of employment opportunities" because of the individual's race, etc. 42 U.S.C. 2000e-2(a). "The principal focus of the statute is the protection of the individual employee * * *. Indeed, the

entire statute and its legislative history are replete with references to protection for the individual employee * * *." *Connecticut* v. *Teal*, 457 U.S. 440, 453-454 (1982); see also *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 709 (1978); *Arizona Governing Committee* v. *Norris*, No. 82-52 (July 6, 1983), slip op. 9; pages 17-21, 26-29, *infra*.

Thus, where the dominant concern of Congress—making individual victims whole—has competed with Congress's concomitant intention to protect seniority systems and the rights they accord to incumbent employees, this Court has very carefully accommodated both interests. Significantly, the constructive seniority rights awarded in *Franks* were not judicially invented rights, but only the rights defined by the existing seniority system itself, once the "rightful place" in that system of each identifiable victim of discrimination was determined. The seniority right of incumbent employees would also continue to be defined by that system, even though the "rightful place" in that system of some incumbents would be adjusted to accommodate the rights of individuals who would have been senior to them but for the employer's unlawful discriminatory acts. See 424 U.S. at 774-779. Thus, the relief prescribed in *Franks* fundamentally preserves rather than abrogates rights under bona fide seniority systems, while extending those rights to identifiable victims of discrimination in order to make them whole.

The basic statutory preservation of bona fide seniority systems was reasserted by the Court the next year in *Teamsters* v. *United States*, 431 U.S. 324 (1977). In *Teamsters*, the defendant trucking company was found to have engaged in an unlawful pattern or practice of confining blacks and Hispanics to lower paying, less desirable jobs, and excluding them from positions as over-the-road ("OTR") truck drivers. The seniority system in the employer's collective-bargaining agreement provided that an incumbent employee who transferred to an OTR position was required to forfeit the competitive seniority he had accumulated in his previous position (company sen-

iority) and to start at the bottom of the OTR driver's seniority list.

After affirming the district court's finding of liability under Title VII, the court of appeals held that all black and Hispanic incumbent employees—including those who had never applied for OTR positions—were entitled to bid for future OTR jobs on the basis of their accumulated company seniority. The appeals court further held that each class member filling such a job was entitled to an award of retroactive seniority on the OTR driver's seniority list dating back to the class member's "qualification date"—the date when (1) an OTR driver position was vacant and (2) the class member met or could have met the job's qualifications.

This Court first reversed the holding that the defendant's seniority system was itself subject to attack as perpetuating the past effects of discrimination. Although the system appeared to violate the rationale in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), the Court held that Congress did not "outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees * * *." 431 U.S. at 352-353.

The Court then considered what remedy was appropriate for the other discriminatory employment practices that had been proved. This Court rejected the defendant's argument that only individuals who had actually applied for OTR positions could obtain relief under Section 706(g). Instead, the Court held that relief in the form of constructive seniority was available to those who could satisfy the burden of proving that they were deterred from applying for that position because of the employer's discriminatory practices and that they were qualified for the job. 431 U.S. at 372. This latter class of plaintiffs, like those who were actually precluded from obtaining the OTR jobs, could show when they presumably would have been employed, but for the discrimination, and thus relief to them would not require modification of the seniority system itself, but merely "rightful place" fitting of individuals into that system. 431 U.S. at 358.

As for those who could not make such a showing, the necessary result is that they were not entitled to any relief in the form of constructive seniority.

Teamsters establishes that Title VII remedies must preserve the seniority rights protected in Section 703(h). Preservation of those rights serves two important concerns: protecting the stability of labor relations by maintaining the seniority system and being fair to innocent incumbent employees.[16] With regard to the latter concern, this Court recently emphasized that, in crafting equitable relief under Title VII, courts must consider the legitimate interests of "innocent third parties." *Ford Motor Co.* v. *EEOC*, *supra*, slip op. 20. See also *Arizona Governing Committee* v. *Norris*, *supra*, slip op. 5 (O'Connor, J., concurring). Indeed, even in a case (unlike this one) in which specified victims of unlawful employment discrimination have been identified, a court, in determining their rightful place, is "faced with the delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing." *Teamsters* v. *United States*, *supra*, 431 U.S. at 372.[17]

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[16] Lower courts have uniformly held that the relief for actual discriminatees does not extend to bumping employees previously occupying jobs; victims must wait for vacancies to occur. See, *e.g.*, *Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 267 (4th Cir. 1976); *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980, 988 (5th Cir. 1969). See also *Airline Stewards & Stewardesses Association* v. *American Airlines*, 573 F.2d 960, 964 (7th Cir.), cert. denied, 439 U.S. 876 (1978). This understanding of the limits of Section 706(g) with regard to actual victims may well have been ratified by Congress in 1972, since it was aware of the *United Papermakers* decision and nothing indicates that the amendment to Section 706(g) was an attempt to alter that interpretation. See Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972*, at 1844 (Comm. Print 1972) (hereinafter cited as *1972 Legislative History*).

[17] The court of appeals incorrectly relied upon the Seventh Circuit's decision in *Airline Stewards and Stewardesses Association* v. *American Airlines*, *supra*, as showing how consent decrees can

In *Ford Motor Co.* v. *EEOC*, *supra*, this Court relied upon both the basic congressional intent to protect seniority and the importance of fairness to incumbent employees in deciding that an employer charged with hiring discrimination under Title VII can toll the continuing accrual of back pay liability under Section 706(g) by unconditionally offering the claimant the job allegedly denied him for impermissible reasons. The Court expressly rejected the argument that the employer must also offer seniority retroactive to the date of the alleged discrimination, for such a rule would "encourage[] job offers that compel *innocent workers* to sacrifice their seniority to a person who has only claimed, but not yet proven, unlawful discrimination." Slip op. 21 (emphasis added). Foreseeing the possibility that layoffs could occur before the reinstated (or newly hired) claimant's Title VII suit was decided, the court reasoned that (*ibid.*)

> an employer may have to furlough an innocent worker indefinitely while retaining a claimant who was given retroactive seniority. If the claimant

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modify collective bargaining agreements in order to further the statutory policy favoring settlements of Title VII cases. The *Stewardesses* case, correctly understood, is contrary to the decision below and illustrates how the relevant interests should be accommodated under Title VII. In *Stewardesses*, it was undisputed that each member of the plaintiff class had been a victim of the defendant's employment discrimination, but there was a dispute as to whether each member had preserved her right to sue. The defendant settled the case, and the intervening union sought to challenge the settlement.

In upholding the settlement, the court of appeals noted that each member of the class was a victim and that, although they all would receive seniority dating to the time of their wrongful discharge, they would not be hired unless there were an opening and they would not be permitted to bump incumbent employees from a particular base, even though their constructive seniority might otherwise have entitled them to do so. This is precisely the type of careful accommodating of the rights of actual victims of discrimination and innocent incumbent employees that this Court's decisions require, and stands in stark contrast to the decision below which forced incumbent employees to be laid off so that non-victim minorities could keep their jobs.

> subsequently fails to prove unlawful discrimination, the worker unfairly relegated to the unemployment lines has no redress for the wrong done him. We do not believe that " 'the large objectives' " of Title VII * * * require innocent employees to carry such a heavy burden.

What emerges from this Court's decisions is the firm rule that a district court in a Title VII case may not modify a bona fide seniority system; it can only slot individuals into their rightful place within that system. Individuals, such as those involved in this case, who are only beneficiaries of affirmative action and not victims of employment discrimination entitled to rightful place relief, have no basis for claiming any seniority in addition to what they have actually accrued on the job. Thus, when the initial hiring order was issued in 1974 and again in 1980, the district court would have been wholly without authority to slot new applicants in place of incumbents (see note 16, *supra*) or to award non-victims of discrimination constructive seniority when hired. The district court's order insulating a certain percentage of minority employees from dismissal under the race neutral seniority system adopted by the City was, however, tantamount to an award of constructive seniority that placed its beneficiaries in a position superior to that of incumbent non-minority employees.[18] Since the order concededly

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[18] It is of no significance that the award of constructive seniority here was only for the limited purpose of determining who would be laid off or demoted. Under the City's bona fide seniority system, that important question was to be determined on the basis of seniority.

Nor can the order be justified by the hyperbole of the courts below that the proposed layoffs would undo all the good that the previous orders had accomplished. First, the percentage of minorities in the Fire Department is still significantly greater than it was when this litigation began and thus the post-layoff Department is significantly improved in racial balance over the prelitigation situation. Second, although layoffs are always traumatic to the individual, they do not normally last forever. The laid off minority employees are at the top of the list to be rehired or promoted and,

embraced persons who were not victims of the defendants' unlawful employment discrimination, the district court's award of retroactive seniority was indistinguishable—save in its timing—from the award condemned in *Teamsters*.[19]

In the instant case, innocent firefighters were required to sacrifice not only their seniority, but also their jobs, to persons who have never claimed to be victims of unlawful discrimination. As a result of the district court's decree, white firefighters with more years of service than black employees were furloughed or demoted, thus creating a new class of victims, who were innocent of any wrongdoing, but were deprived of their rights under a valid

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without the district court's modification, when the financial crisis of the City is over, if it is not already, and fire personnel are hired or repromoted, minorities will continue back on the track set by the 1980 order. The effect of the layoff is delay in achieving the order's goal of a rough racial balance in employment at all levels, but delay is inherent in that process, given the legitimate interests of incumbents, and does not justify extraordinary relief.

[19] Nor is a contrary result justified by the court of appeals' assertion that allowing layoffs would undermine the purpose of the 1980 decree (Pet. App. A37). There has been no new violation of the Act that would require a modification of the decree and accordingly the issue is simply whether the district court could have modified the seniority system when it initially entered its order in 1980. If the City of Memphis had been faced with this budgetary crisis in 1980 when the original affirmative action order was imposed, no one would have suggested that the remedial order was undermined by the temporary failure of the City to integrate its work force. Certainly, the district court would have lacked authority either to order the City to hire additional employees or to require the City to bump incumbent white employees to make room for minority hires. See cases cited note 16, *supra*. The order in this case does no more than retroactively accomplish what the court could not have done directly in 1980 if the economic problems had existed then; it requires the City essentially to bump incumbent whites. This result is directly contrary to this Court's admonition that equity under Title VII should not permit "'different results for breaches of duty in situations that cannot be differentiated in policy.'" *Ford Motor Co.* v. *EEOC*, *supra*, slip op. 8 (citation omitted).

seniority system.[20] This was not a permissible exercise of remedial authority under Title VII. That remedial authority is limited to the effectuation of the policies of the Act; one of the Act's firmly established policies is the preservation of bona fide seniority systems. No court has found any discriminatory purpose underlying the seniority system in this case[21] and accordingly the district court

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[20] The court of appeals reasoned (Pet. App. A32) that modification of the consent decree could be justified as an interpretation of the consent decree as a contractual obligation. Aside from the obvious point that the parties made no provision for layoffs and thus the decree cannot fairly be construed to require modification of the layoff process (Pet. App. A46; Martin, J., dissenting), it is clear that the City could not unilaterally contract away the incumbent employees' seniority rights that are in fact protected by Title VII. See *W.R. Grace & Co.* v. *Local 759*, No. 81-1314 (May 31, 1983), slip op. 14.

Nor could such an agreement be approved under *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979). Unlike the private voluntary craft training program in that case, the court's layoff order led directly to the discharge of senior white employees, solely in order to maintain existing racial percentages. Even in interpreting Title VII's prohibitions in a context not involving state action, *Weber* disapproved actions which "unnecessarily trammel the interests of the white employees." 443 U.S. at 208. In contrast to this case, two of the critical facts leading to the conclusion that the training program in *Weber* did not violate Title VII were that the program did not require the discharge of white workers and their replacement with new black hires and was not intended to maintain racial balance. What is more important, the defendant in this case is a municipality and its conduct constitutes state action. Accordingly, the court of appeals' "contract" theory also implicates a serious equal protection issue, which that court completely ignored. Since the City plainly did not enter into a contract modifying seniority rights on the basis of race, however, there is no need for the Court to consider the constitutional implications of such a contract.

[21] The court of appeals at one point seems to indicate that the City selected job classifications for layoff "where minorities had recently made the most gains under the affirmative action provisions" (Pet. App. A37). No similar finding was made by the district court, and the Mayor of the City testified that jobs in the Fire Department were chosen because a study revealed that the

was without authority to reconstruct it.[22]

B. The Limitation On The Court's Remedial Authority Contained In The Last Sentence Of Section 706(g) Confirms That Congress Did Not Intend To Grant Constructive Seniority In The Circumstances Of This Case

Our argument that the policies of Title VII make plain that bona fide seniority systems ought not to be modified to grant non-victim beneficiaries of affirmative action additional protection from layoffs is confirmed by the limitation on the powers of a court of equity in Title VII cases contained in the last sentence of Section 706(g). That sentence reads in pertinent part:

> No order of the court shall require the * * * reinstatement, or promotion of an individual as an employee * * * if such individual * * * was suspended

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City's budget for the Fire Department was substantially higher than the national average and thus cuts could be made there without eliminating necessary services (J.A. 36-37).

Obviously, if the City had selectively chosen layoffs on the basis of which jobs were filled by more blacks, this would be an independent basis for challenging the City's action, but the remedy for such discrimination would not be to require a modification in the City's bona fide seniority system.

[22] The decision of the district court cannot be sustained as a proper exercise of "discretion in protecting the status quo in the Fire Department" (Pet. App. A46) (Martin, J., concurring and dissenting). While it is true that the entry of a preliminary injunction by a district court generally is reviewable on an abuse of discretion standard, "[i]f the [reviewing] court has a view as to the applicable legal principle that is different from that premised by the trial judge, it has a duty to apply the principle which it believes proper and sound." *Delaware & H. Ry.* v. *United Transportation Union*, 450 F.2d 603, 620 (D.C. Cir.) (Leventhal, J.), cert. denied, 403 U.S. 911 (1971). See also *Withrow* v. *Larkin*, 421 U.S. 35, 55 (1975). The preservation of the status quo cannot be justified at the expense of wrongfully depriving the enjoined party and third parties of substantial rights. 450 F.2d at 621; *O'Connor* v. *Board of Education*, 645 F.2d 578, 582-583 (7th Cir.), cert. denied, 454 U.S. 1084 (1981); *Punnett* v. *Carter*, 621 F.2d 578, 587 (3d Cir. 1980).

> or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin * * *.

Section 706(g) by its terms thus precludes the kind of individual redress granted to these minority employees who have suffered no discrimination.[23]

This conclusion is also required by the remedial purposes of Title VII embodied in Section 706(g). As this Court has recognized, "[t]he scope of a district court's remedial powers under Title VII is determined by the purposes of the Act." *Teamsters* v. *United States*, *supra*, 431 U.S. at 364. The central remedial purposes of Title VII are, as this Court has often observed, "to end discrimination * * * [and] to compensate the victims for their injuries." *Ford Motor Co.* v. *EEOC*, *supra*, slip op. 11; see, *e.g.*, *Teamsters* v. *United States*, *supra*, 431 U.S. 364; *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 418. Section 706(g) thus requires a court "to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination in hiring." *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 764 (footnote omitted); accord, *Teamsters* v. *United States*, *supra*, 431 U.S. at 364.

The district court's decree ordered the City to implement layoffs in order to maintain existing levels of black employees. In other words, the decree required the City to lay off employees in accordance with racial quotas, and did so without regard to whether the individuals retained had been the actual victims of the City's employment discrimination. This remedy, which inevitably provides employment preferences to individuals who were not "suspended or discharged" by the employer in violation of Title VII, would thus appear to be the archetypal form

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[23] The Equal Employment Opportunity Commission disagrees with this interpretation of Section 706(g) and believes that its adoption might call into question numerous extant consent decrees and conciliation agreements to which the EEOC is party.

was without authority to reconstruct it.[22]

B. The Limitation On The Court's Remedial Authority Contained In The Last Sentence Of Section 706(g) Confirms That Congress Did Not Intend To Grant Constructive Seniority In The Circumstances Of This Case

Our argument that the policies of Title VII make plain that bona fide seniority systems ought not to be modified to grant non-victim beneficiaries of affirmative action additional protection from layoffs is confirmed by the limitation on the powers of a court of equity in Title VII cases contained in the last sentence of Section 706(g). That sentence reads in pertinent part:

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[22] The decision of the district court cannot be sustained as a proper exercise of "discretion in protecting the status quo in the Fire Department" (Pet. App. A46) (Martin, J., concurring and dissenting). While it is true that the entry of a preliminary injunction by a district court generally is reviewable on an abuse of discretion standard, "[i]f the [reviewing] court has a view as to the applicable legal principle that is different from that premised by the trial judge, it has a duty to apply the principle which it believes proper and sound." *Delaware & H. Ry.* v. *United Transportation Union*, 450 F.2d 603, 620 (D.C. Cir.) (Leventhal, J.), cert. denied, 403 U.S. 911 (1971). See also *Withrow* v. *Larkin*, 421 U.S. 35, 55 (1975). The preservation of the status quo cannot be justified at the expense of wrongfully depriving the enjoined party and third parties of substantial rights. 450 F.2d at 621; *O'Connor* v. *Board of Education*, 645 F.2d 578, 582-583 (7th Cir.), cert. denied, 454 U.S. 1084 (1981); *Punnett* v. *Carter*, 621 F.2d 578, 587 (3d Cir. 1980).

of relief that Congress determined should not be used to "remedy" such violations of the Act. The statute's language on this point is further supported by its legislative history.[24]

Representative Celler, floor manager of the House bill in 1964 and a principal draftsman of Section 706(g) (see 110 Cong. Rec. 2567 (1964) (remarks of Rep. Celler)), expressly noted that a court order could be entered only on proof "that the particular employer involved had in fact, discriminated against one or more of his employees because of race," emphasizing that "[e]ven then, the court could not order that any preference be given to any particular race * * *, but would be limited to ordering an end to discrimination." *Id.* at 1518. Representative Celler's understanding of Title VII was repeated by other supporters during the House debate.[25]

Supporters of Title VII in the Senate, following the lead of Senator Humphrey, the Democratic floor manager of the bill (110 Cong. Rec. at 5423 (1964)), took a similar view of the remedial authority of the courts under Section 706(g). In an interpretative memorandum often cited by this Court as an "authoritative indicator" of the meaning of Title VII (*e.g.*, *American Tobacco Co.* v. *Patterson*, *supra*, 456 U.S. at 73), Senators Clark and Case, the bipartisan floor "captains" responsible for explaining Title VII, provided a detailed description of the intended

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[24] For a fuller description of the legislative history, see Comment, *Preferential Relief Under Title VII*, 65 Va. L. Rev. 729 (1979). See also Brief Amicus Curiae for the AFL-CIO at pages 18-25 and 1a-8a.

[25] See 110 Cong. Rec. 1540 (Rep. Lindsay); *id.* at 1600 (Rep. Minish). Similarly, an interpretative memorandum prepared by the Republican Members of the House Judiciary Committee defined the scope of permissible judicial remedies under Title VII thusly: "[A] Federal court may enjoin an employer * * * from practicing further discrimination and may order the hiring or reinstatement of an employee * * *. But, [T]itle VII *does not permit the ordering of racial quotas* in businesses or unions * * *." (*Id.* at 6566 (emphasis added)).

meaning of Section 706(g). Noting that "the court could order appropriate affirmative relief," Senators Clark and Case stressed:

> No court order can require * * * reinstatement * * * or payment of back pay for anyone *who was not discriminated against in violation of this title.* This is stated expressly in the last sentence of Section [706(g)] which makes clear what is implicit throughout the whole title; that employers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because of race, color, religion, sex, or national origin. [110 Cong. Rec. at 7214. See *id.* at 6549 (Senator Humphrey).]

Moreover, nothing in the 1964 legislative debates so much as hints at support for the remedy adopted by the district court here. To the contrary, every Representative and every Senator to address the issue decried the use of such remedies. See 110 Cong. Rec. 6549 (remarks of Sen. Humphrey); *id.* at 6563 (remarks of Sen. Kuchel), 7207 (remarks of Sen. Clark).[26]

Congress's dominant concern with granting victim-specific, make-whole relief was not modified when Congress amended Title VII in 1972. The only arguably relevant change of Section 706(g) was the addition of

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[26] To dispel all doubt as to the intended reach of Section 706(g), Senator Humphrey expressly addressed the claims of opponents regarding quota remedies as follows (110 Cong. Rec. 6549): "Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require * * * firing * * * of employees in order to meet a racial 'quota' or to achieve a certain racial balance." See also *id.* at 6563 (remarks of Sen. Kuchel); *id.* at 7207 (remarks of Sen. Clark). Moreover, throughout the Senate debate, the principal Senate sponsors prepared and delivered a daily Bipartisan Civil Rights Newsletter to supporters of the bill. The issue of the Newsletter published two days after the opponents' filibuster had begun, declared: "Under title VII, *not even a court,* much less the Commission, *could order racial quotas* or * * * payment of back pay *for anyone who is not discriminated against in violation of this title.*" *Id.* at 14465 (emphasis added).

language making clear that discriminatees are entitled not only to the specific types of relief expressly mentioned in the section, but also to "any other equitable relief as the court deems appropriate." [27]

That this language was not added to the first sentence of Section 706(g) for the purpose of expanding judicial remedial authority beyond traditional limits is made clear in the Section-by-Section Analysis of the conference bill.[28]

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[27] The language added in 1972 had its origin in an amendment introduced by Senator Dominick, who opposed a provision in the Labor Committee bill to confer "cease and desist" authority on the EEOC; the committee bill proposed to make no change in either Section 703 or Section 706(g). Dominick's filibuster of the committee bill ended with adoption of his amendment, which denied the EEOC independent enforcement authority, but granted it power to institute lawsuits in federal court. The purpose of the language added to the first sentence of Section 706(g) was not explained, or even discussed, by Senator Dominick or anyone else during the debate.

[28] The House of Representatives legislated in 1972 on the understanding that Title VII did not, and as amended would not, authorize judicial impostion of quota remedies. Although it is not at all clear precisely what any individual member of Congress meant when referring to "quotas," either in 1964 or 1972, it seems plain that the definition must encompass the type of strict numerical guarantee against layoffs at issue in this case. Accordingly, there is no occasion to consider here whether these legislative statements would apply to any situation except the classic, fixed numerical quota remedy in the layoff context.

The 1972 amendments began in the House, where Representative Hawkins introduced a bill designed, among other things, to give the EEOC "cease and desist" powers and to transfer the administration of Executive Order No. 11246 from the Labor Department's Office of Federal Contract Compliance (OFCC) to the EEOC. Because the OFCC had imposed quotas in its enforcement of E.O. 11246, many members of Congress feared that the bill would confer on the EEOC authority to order employment quotas.

Before debate commenced, Representative Dent, the bill's floor manager, proposed an amendment that "would forbid the EEOC from imposing any quotas or preferential treatment of any employees in its administration of the Federal contract-compliance program." 1972 *Legislative History*, *supra* note 16, at 190. The amendment did not address the remedial power of courts under Title VII because,

That Analysis explained that "the scope of relief under [Section 706(g)] is intended to make the *victims of unlawful discrimination whole*, * * * [which] requires that *persons aggrieved* by the consequences and effects of the unlawful employment practice *be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.*" (Emphasis added.) 118 Cong. Rec. 7168 (Senate); *id.* at 7565 (House).[29] Compare *Franks* v. *Bowman Transportation Co., supra*, 424 U.S. at 764.

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according to Representative Dent, "[s]uch a prohibition against the imposition of quotas or preferential treatment already applies to actions brought under Title VII." *Ibid.* See also *id.* at 204; *id.* at 208-209 (remarks of Rep. Hawkins). The House ultimately passed a substitute bill that left administration of Executive Order No. 11246 with the OFCC, and the Dent amendment never came to a vote. The House debate reflects, however, broad agreement that Title VII does not and should not permit courts to order "quota" remedies.

It is also noteworthy that the 1972 Congress refused to follow the Senate's proposed amendment to delete the final sentence from Section 706(g). (S. 2515, 92d Cong., 2d Sess. (1972); 1972 *Legislative History, supra* note 16, at 1783). Instead, it ultimately adopted the House bill (H.R. 1746, 92d Cong., 1st Sess. (1972)), which left the 1964 provision largely unchanged, except for the addition of a provision limiting back pay awards. See 1972 *Legislative History* at 331-332. Thus the bill that ultimately emerged from the House-Senate conference and became law contained the original final sentence of Section 706(g). S. Conf. Rep. No. 92-681, 92d Cong., 2d Sess. 5-6, 18-19 (1972); H.R. Conf. Rep. No. 92-899, 92d Cong., 2d Sess. 5-6, 18-19 (1972).

[29] Some courts construing Section 706(g) have mistakenly attached interpretative significance to Senator Ervin's unsuccessful attempt to amend Title VII in 1972. See *United States* v. *Int'l Union of Elevator Constructors*, 538 F.2d 1012, 1019-1020 (3d Cir. 1976). Those amendments, however, did not seek to alter Section 706(g). Indeed, it is clear from the language of the amendments (118 Cong. Rec. 1662, 4917) and from their sponsor's explanations (*id.* at 1663-1664, 4917-4918) that neither amendment was concerned directly with the remedial authority of courts. To the contrary, the amendments would merely have extended to all federal Executive agencies, particularly the Office of Federal Contract Compliance, Section 703(j)'s substantive prohibition against requiring employers to engage in racially preferential hiring in order to rectify racial

Thus, as this Court concluded in *Franks* v. *Bowman Transportation Co., supra*, 424 U.S. at 764 n.21, the "extensive legislative history underlying the 1972 amendments," including addition of the "phrase speaking to 'other equitable relief' in § 706(g)" indicates "that 'rightful place' was the intended objective of Title VII and the relief accorded thereunder." Accord, *Teamsters* v. *United States, supra; Albemarle Paper Co.* v. *Moody, supra.* The persons who benefitted from the district court's reconstructed seniority system were not victims of discrimination, and the grant of constructive seniority to them distorts the statute's purposes by conferring employment benefits on the basis of race.

C. The Courts Below Should Have Avoided Creating A Substantial Constitutional Question By Refraining From Issuing A Race Conscious Seniority Order That Was Not Clearly Intended By Congress In Title VII

By upholding the district court's order under Title VII for the sole purpose of preventing any reduction in the percentage of minority employees in the Fire Department, especially in the higher ranks, the court of appeals' holding raises the issue of the constitutionality of a race conscious order under the equal protection component of the Due Process Clause of the Fifth Amendment (Pet. App. A22).[30] Obviously, such an order classifies on the basis of race (indeed, disadvantages some persons because of their race) and thereby implicates a serious equal pro-

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imbalance in their workforces. *Ibid.* Thus, notwithstanding the statements of Senators Javits and Williams, who spoke against the Ervin amendment (see 1972 *Legislative History, supra* note 16, at 1046-1048, 1071-1073), the Ervin amendments did not seek to alter Section 706(g), and did not directly concern the remedial authority of courts.

[30] Equal protection analysis under the Due Process Clause of the Fifth Amendment is the same as that under the Fourteenth Amendment. *E.g., Buckley* v. *Valeo*, 424 U.S. 1, 93 (1976). It is well established that judicial action is no less subject to the constraints of the Constitution's equal protection guaranties than is legislative action. See *Ex parte Virginia*, 100 U.S. 339 (1879).

tection concern not previously addressed by this Court. Unlike the practices upheld in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), and *Regents* v. *Bakke*, 438 U.S. 265 (1978), individuals in this case have been deprived of previously vested rights; and unlike the situation in *Franks* v. *Bowman Transportation Co.*, *supra*, those rights were subordinated in favor of competing claims based solely on race and not because of previous injury.

Whether Congress could provide under Section 5 of the Fourteenth Amendment that race conscious modifications of a seniority system to remedy past discrimination are permissible in order to maintain an integrated work place and, if so, what types of modifications it could approve are issues that have never been decided by this Court. Cf. *Fullilove* v. *Klutznick*, *supra*, 448 U.S. at 483. But they are questions that should be addressed only when it is reasonably clear that Congress intended to authorize such relief and thereby force the Court to evaluate Congress's power to act through the courts on a race conscious basis.[31] This is particularly so in a Title VII case, where the district court's equitable authority is carefully delimited by Congress's intent and the purposes of the Act. See *Ford Motor Co.* v. *EEOC*, *supra*, slip op. 8; *Teamsters* v. *United States*, *supra*, 431 U.S. at 364; *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 416-417. Thus, if the Act does not support the order of the court, there is no residual equitable discretion.

Regardless of what can be gleaned from the legislative history of Title VII with regard to its general policies, there is not a shred of evidence that Congress either in 1964 or 1972 intended to authorize a district court to modify a last-hired, first-fired rule in order to maintain

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[31] Another possibility, not presented here, would be a requirement that other race-neutral indicia of merit, in addition to seniority, be utilized in determining which employees to lay off, in the hope of preserving more of the results of the consent decree. It might well be within the constitutional power of Congress to impose such a requirement, but, for reasons previously stated, judicial modification of the seniority system in that way would be inconsistent with the remedial policies of Title VII.

racial balance.[32] Moreover, no court had ever considered the issue prior to 1972. In the absence of clear evidence of at least arguable congressional intent to allow a district court to take into account such societal concerns as a basis for disadvantaging one racial group as against another with regard to seniority rights, the courts below should have interpreted Title VII as prohibiting the order adopted in this case and thereby avoided creating a difficult constitutional issue. See *United States* v. *Security Industrial Bank*, No. 81-184 (Nov. 30, 1982), slip op. 8; *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 507 (1979).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1983

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[32] The court of appeals opined that racial balance in public safety departments is in the public interest (Pet. App. A31). If such concerns had led state or local authorities to adopt a race conscious hiring or layoff plan because of operational needs in enhancing the community's fire protection, a substantial constitutional question would be presented. See *Minnick* v. *California Department of Corrections*, 452 U.S. 105 (1981); cf. *Morton* v. *Mancari*, 417 U.S. 535 (1974). But the City-adopted seniority system precluded the assertion here by the City of any such operational needs, and it was improper in these circumstances for the courts below to hypothesize such operational needs and thereby impinge upon constitutionally protected interests of individuals.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 414394 74

No. 82-206-CFX
Status: GRANTED

Title: Firefighters Local Union No. 1784, Petitioner
v.
Carl W. Stotts, et al.

Docketed:
August 4, 1982

Court: United States Court of Appeals
for the Sixth Circuit

Vide:
82-229

Counsel for petitioner: Blair, Allen S., Pierce Jr., Clifford D.

Counsel for respondent: Fields, Richard B.

Entry	Date	Note	Proceedings and Orders
1	Aug 4 1982	G	Petition for writ of certiorari filed.
3	Aug 27 1982		Order extending time to file response to petition until October 1, 1982.
4	Sep 29 1982		Order further extending time to file response to petition until October 8, 1982.
5	Sep 29 1982		Brief amicus curiae of Intl. Assn. of Firefighters filed.
6	Oct 13 1982		Brief of respondent Carl W. Stotts, et al. in opposition filed. VIDED.
7	Oct 13 1982		DISTRIBUTED. October 29, 1982
8	May 23 1983		REDISTRIBUTED. May 26, 1983
9	May 23 1983	X	Suggestion of mootness filed by respondents Carl W. Stotts, et al.. VIDED.
10	May 24 1983	P	Response requested. (Due May 31, 1983 - NONE RECEIVED)
11	May 27 1983		Petitioner's opposition to respondents' suggestion of mootness filed.
12	May 31 1983		REDISTRIBUTED. June 2, 1983
13	Jun 6 1983		Petition GRANTED. This case is consolidated with case No. 82-229, Memphis Fire Department, et al. v. Carl W. Stotts, et al., and a total of one hour is allotted for oral argument.
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15	Jul 11 1983		Order extending time to file brief of petitioner on the merits until August 20, 1983.
16	Jul 20 1983		Joint appendix filed. VIDED.
17	Jul 29 1983		Record filed.
18	Jul 29 1983		Certified original record & C.A. proceedings received.
19	Aug 19 1983		Brief amicus curiae of Washington Legal Foundation filed. VIDED.
20	Aug 19 1983		Brief of petitioner Firefighters Local Union No. 1784 filed. VIDED.
21	Aug 20 1983		Brief amicus curiae of Anti-Defamation League of B'nai B'rith filed. VIDED.
23	Aug 19 1983		Brief amicus curiae of Equal Employment Advisory Council filed. VIDED.
24	Aug 19 1983		Brief amicus curiae of Intl. Assn. of Firefighters filed. VIDED.
25	Aug 20 1983		Brief amicus curiae of Detroit Police Officers Assn. filed. VIDED.
26	Aug 19 1983		Brief of petitioners Memphis Fire Dept., et al. filed. VIDED.
27	Aug 19 1983		Brief of American Federation of Labor and Congress of

No. 82-206-CFX

Entry	Date	Note	Proceedings and Orders
			Industrial Organizations, et al. as amici curiae filed. VIDED.
28	Aug 25 1983	D	Motion of petitioners for divided argument filed.
29	Aug 19 1983		Brief amicus curiae of United States filed. VIDED.
30	Sep 2 1983	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
32	Sep 8 1983		Order extending time to file brief of respondent on the merits until October 24, 1983.
33	Sep 9 1983		Response of respondents to motion of Solicitor General for leave to participate in oral argument filed.
34	Sep 9 1983	D	Motion of respondents for divided argument and for additional time for oral argument filed.
35	Oct 3 1983		Motion of petitioners for divided argument DENIED.
36	Oct 3 1983		Motion of respondents for divided argument and for additional time for oral argument DENIED.
37	Oct 3 1983		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. and ten minutes of petitioners' time for oral argument is allotted for that purpose.
39	Oct 18 1983		Order further extending time to file brief of respondent on the merits until October 28, 1983.
40	Oct 21 1983		Brief amicus curiae of Officers for Justice, et al. filed. VIDED.
41	Oct 24 1983		SET FOR ARGUMENT. Tuesday, December 6, 1983. (1st case) This case is consolidated with No. 82-229. (1 hour)
42	Oct 22 1983		Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law filed. VIDED.
43	Oct 22 1983		Brief amicus curiae of American Jewish Congress filed. VIDED.
44	Oct 24 1983		Brief amicus curiae of National Organization of Women, et al. filed. VIDED.
45	Oct 28 1983		Order further extending time to file brief of respondent on the merits until October 31, 1983.
46	Oct 27 1983		Brief amicus curiae of Natl. Black Police Assn. et al. filed. VIDED.
47	Oct 28 1983		Brief amicus curiae of Mexican American Legal Defense and Educational Fund filed. VIDED.
48	Oct 28 1983		Brief amicus curiae of Affirmative Action Coordinating Center, et al. filed. VIDED.
49	Oct 28 1983		Brief amicus curiae of Detroit filed. VIDED.
50	Oct 31 1983		Brief of respondents Carl W. Stotts, et al. filed. VIDED.
51	Nov 2 1983		CIRCULATED.
54	Nov 28 1983	X	Reply brief of petitioners Firefighters Un. No. 1784, et al. filed. VIDED.
55	Dec 6 1983		ARGUED.